S. Hrg. 99-713

# POLYGRAPH PROTECTION ACT OF 1985

## HEARING

BEFORE THE

## COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

## S. 1815

TO PREVENT THE DENIAL OF EMPLOYMENT OPPORTUNITIES BY PROHIBITING THE USE OF LIE DETECTORS BY EMPLOYERS INVOLVED IN OR AFFECTING INTERSTATE COMMERCE

APRIL 23, 1986

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# POLYGRAPH PROTECTION ACT OF 1985

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## WEDNESDAY, APRIL 23, 1986

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
*Washington, DC.*

The committee convened, pursuant to notice, at 9:37 a.m., in room SD-430, Dirksen Senate Office Building, Senator Orrin Hatch (chairman) presiding.

Present: Senators Hatch, Thurmond, Nickles, Kennedy, Wallop, Kerry, Simon, Dodd, Grassley, and Pell.

### OPENING STATEMENT OF SENATOR HATCH

The CHAIRMAN. Today's hearing of the Committee on Labor and Human Resources will examine S. 1815, the Polygraph Protection Act, which Senator Kennedy and I introduced over here in the Senate, and we have the distinguished House leaders with us here today as well.

The bill would provide needed protection, in our opinion, to working men and women throughout this country by barring the use of lie detectors in the private sector.

Today, polygraph tests are quickly becoming the rule, not the exception. Over 2 million tests are given each year to employees in fast food stores, to bank tellers and miners, to grocery store clerks and factory workers, to truck drivers and exterminators, among others.

But there is no conclusive proof that polygraph tests work. According to the Office of Technology Assessment, the Board of which both Senator Kennedy and I sit on:

> There is very little research or scientific evidence to establish polygraph test validity in screening situations, whether they be preemployment, preclearance, periodic or aperiodic, random or dragnet.

The American Psychological Association has stated that:

> The scientific evidence is still unsatisfactory for the validity of psychophysiological indicators to infer deceptive behavior. Such evidence is particularly poor concerning polygraph use in employment screening.

Nonetheless, each day Americans are being branded by the 15-minute polygraph special, by ignorant and malicious examiners, and by employers who use the lie detector as a cover for improper acts.

Critics of the bill claim they have never heard of a single person who has been victimized by a polygraph. They should meet Patricia DeFiore of Dix Hills, NY, who worked for 8 years at Fortunoffs, a department store. She was fired after refusing to take a polygraph exam, even though her supervisor said he knew she was not guilty of any theft.

They should meet Dr. Bernard Schermann of Salinas, CA. He was a respected manager of a jewelry company, but was fired after flunking a lie detector test. Company officials admitted to him that they knew he had done nothing wrong, but felt they needed to use his failure to set an example for others.

They should listen to Mary Braxton, who will testify today. Mary will explain how an examiner can coerce a statement from an employee, what it is like to tell your children you have been fired because of a 15-minute polygraph examination, and how hollow victory can be, even though you may win a judgment for $21,000.

In each of these instances and many more which have been submitted to our committee, the employer chose to ignore the real human experience of years of dedicated and loyal service and relied instead on the findings of a machine.

Employers should be able to hire honest, dependable and qualified employees and should be able to undertake reasonable measures to avoid or correct employee theft or chronic drug use. This is why the witnesses today represent a cross-section of opinions about the legislation pending before our committee.

We expect to receive testimony which will address, among other things, three basic issues.

First, can the polygraph examination be accurate as it is currently being used in the private sector?

Second, why have businesses been able to operate efficiently and economically in States where polygraph exams are already prohibited if the polygraph is so critical to the employment process?

And finally, how can this committee address legitimate concerns raised by specific businesses or industries without jeopardizing the rights of employees?

As we seek to resolve these difficult questions, I hope we keep in mind the fact that in this country, an indicted criminal suspect cannot be forced to take a lie detector test. And surely the American worker deserves comparable protection in the eyes of many people.

Now, I have to admit this is a very difficult issue for me as chairman of this committee. I think there are two sides to this issue, and I have chosen thus far to come down on this side of banning polygraph examinations.

On the other hand, I have met with people who say that without the polygraph examination, they may have very grave difficulties, and there may be safety concerns that really have to be considered.

One set of businessmen came in and said they do not even rely on the polygraph examination, that the mere fact that people are attached to the machine causes them to tell the truth, and they are able to find the heavy drug users and others who have committed felonies and other acts of theft and deception. That certainly appeals to a lot of people in the business world and a lot of people who are examining this issue. On the other hand, we have evidence that there are at least 50,000 people in our society each year who are branded as liars by inadequate and improper polygraph examinations. So we are concerned about that, and that is why we are looking into this today.

We are happy to have all of our witnesses here with us, and with that, I will turn to Senator Kennedy.

## OPENING STATEMENT OF SENATOR KENNEDY

Senator KENNEDY. Thank you very much, Mr. Chairman.

I express our appreciation for holding these hearings this morning. As you pointed out, what we are basically talking about is a condition of employment. That is the issue that is before our committee this morning, and whether the use of these various devices are sufficiently reliable to be able to be used in order to exclude individuals who desire such employment.

The legislation which you and I have drafted meets, I think, some of the very important concerns dealing with vital security issues. I think we have addressed those in the course of the development of the legislation. I think all of us who are supporting this legislation have been impressed by the studies that have been done, in the most recent time, as you mentioned, by the Office of Technology Assessment, that has raised the most grievous questions about the degree of reliability of these kinds of mechanisms. And what we have seen is in the workplace across this country, a dramatic escalation of the use of these various devices, with the kinds of injustices which you have outlined here.

So this is an important issue. We know the great interest that this has among working men and women across this country and the importance of protecting their rights, and I look forward to the witnesses that we have this morning and express our appreciation from this side for commencing these hearings today.

[The prepared statement of Senator Kennedy follows:]

### PREPARED STATEMENT OF SENATOR KENNEDY

Senator KENNEDY. I want to commend the Chairman for introducing this important legislation, and for holding these hearings.

The use and abuse of these so-called "lie-detectors" has reached truly alarming proportions. Over two million of these tests are administered annually.

The scientific evidence is overwhelming, the conclusions clear: There is no physiological indicia capable of distinguishing truth from deception.

We have known this for over 20 years. A House Government Operations Subcommittee concluded two decades ago that, and I quote: There is no lie detector, neither machine nor human. People have been deceived by a myth that a metal box in the hands of an investigator can detect truth from deception.

One of the root flaws of these types of tests was probably best summed up by former Senator Sam Ervin, who said:

> A lie detector test to innocent citizens simply wanting a job reverses our cherished presumption of innocence. If an employee refuses to submit to the text, he is automatically guilty. If he submits to the test, he is faced with the burden of proving his innocence.

Proving his or her innocence, I might add, with devices which clearly cannot detect either truth or deception. These tests do measure stress—but that stress can be caused by fear, anger, anxiety, hate, embarassment, nervousness, fear of being fired—or lying. Neither the examiner nor the machine can determine what triggered the stressful reaction.

I look forward to the testimony of today's witnesses, and I especially look forward to working closely together with the chairman and the other distinguished members of this committee in fashioning and moving S. 1815 out of committee, and into law.

The CHAIRMAN. Thank you, Senator Kennedy.

We will turn to Senator Nickles at this time.

Senator NICKLES. Mr. Chairman, thank you.

I join in Senator Kennedy's comments in appreciation for the hearing today, and I look forward to what our witnesses have to say. I am sure we will have several people testify who are far more expert than this Senator and probably most people in the Senate.

I think there are a lot of questions as far as the use of the lie detector or polygraph examinations for employment, preemployment, and also for investigative purposes.

I think it is important for us to find out if they are reliable, have they been abused, have they been misused, have they violated employees' rights; are they a viable tool for industry in finding some problems that occur. The problems may be in drug tampering.

I am interested to know if we are looking at legislation that would prohibit the use of the polygraph in trying to investigate cases where we have seen drug abuse, where we have seen someone tampering with drugs, or where we have seen theft occur. I think we are going to have some people say that it has been a valuable tool.

Again, I do not have all the answers and I look forward to some of the statements. I have talked to some individuals who have said they felt like it is a very valuable tool in cases in even small retail outlets, where they have used the polygraph when they have noticed instances of theft occurring. They are able to use the polygraph to identify those sources of the problem.

Again, I am interested in knowing whether abuses are occurring then.

I am also interested in finding out more about the legislation, whether the sponsors of the legislation, in their prohibition of the use of the polygraph, are prohibiting the use of the polygraph for investigative purposes.

I appreciate your having the hearing today, and I look forward to the statements that will be made by our experts as well.

The CHAIRMAN. Thank you, Senator Nickles.

Senator Kerry.

## OPENING STATEMENT OF SENATOR JOHN F. KERRY

Senator KERRY. Mr. Chairman, I want to first thank you for your foresight in being the principal sponsor of this important piece of legislation and for holding this hearing which I know will cover many of the issues involving the use of the polygraph in employment. As you know, polygraph use has tripled in the last 10 years and I believe that you share my belief that as industry reliance of this device grows, Congress has an obligation to decide whether the use of this so-called "tool" constitutes an infringement on the rights of employees and prospective employees. I believe that polygraph use, because of questions about its reliability as well as widespread instances of its abuse, are such an infringement and consequently I am a cosponsor of the Polygraph Protection Act of 1985 which was introduced by you with Senator Kennedy.

As you know, the polygraph instrument itself cannot detect lies. It is wholly dependent on a subjective reading by a polygrapher. A 1983 OTA study, whose principal author, Dr. Leonard Saxe, of Boston University, is with us today, concluded that lies were detected between 50.6 percent to 98.6 percent of the time and that true statements were correctly classified between 12.5 percent and 94.1 percent of the time. That 50.6 percent number on the low side represents a reliability of 0.6 percent better than the flip of a coin, and a great deal of evidence indicates that it is for the most part much more difficult to prove a subject's innocence.

As a prosecutor in Middlesex County in Massachusetts, I found the polygraph to be a useful tool in helping to determine the veracity of statements by criminal defendants. Because of that experience, I an pleased that this legislation includes an exemption for Federal, State, and local governments as well as for contractors doing sensitive defense work. But of the estimated 2 million people a year who are administered polygraph tests, 98 percent of them are given by private business with 75 percent of those tests being given for preemployment screening. The OTA study concluded that "the available research evidence does not establish the scientific validity of the polygraph test for personnel screening." Yet the increasing amount of preemployment testing means an increasing number of our citizens who are dependent on the results of this often unreliable machine. American courts cannot compel defendants to take these tests and I believe that our basic American values are corrupted when we mandate these tests as a condition for employment.

There are other concerns that I have about the use of the polygraph as a tool of intimidation. The Florida polygrapher who noted that the polygraph was "the best confession-getter since the cattle prod" said a mouthful. Many polygraphers say that the bulk of their confessions take place just prior to the actual examination when the subject is told about the high accuracy of the machine. They believe that the specter of an infallible lie detector causes people to confess rather than be caught by the machine. I believe that this technique, which appears to be a fundamental part of the preemployment screening polygraph progress, is unfair and abusive to prospective employees where their only crime is wanting employment.

I am proud that my home State of Massachusetts long ago banned the polygraph for employment purposes. In 1959, we became the first State in the country to bar its use in employment. Our economy, as most of America knows, has thrived in recent years. Merchants and industries in Massachusetts, whose counterparts in other parts of the country say that they cannot do without the polygraph, are doing just fine and live without the huge losses that polygraph users allege would happen with a polygraph ban. In addition, I am told that some national companies who operate in States like Massachusetts or the 20 States that ban or restrict polygraph use, do, as a matter of course, test their prospective employees out of State. This bill would end this wholesale circumvention of our State laws.

Once again, Mr. Chairman, I want to thank you for holding this hearing. I look forward to listening to the testimony of the many experts and interested parties that we will be hearing from this morning.

The CHAIRMAN. Thank you, Senator Kerry.

Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Chairman, I wish to commend you for holding hearings to consider whether polygraph testing should be prohibited in the private sector.

The House of Representatives recently passed legislation similar to the bill which we are discussing today. I believe it is essential that we in the Senate carefully consider whether such a federally imposed prohibition is necessary.

I have often expressed my firm belief in the principles of the 10th amendment to the U.S. Constitution. Those powers which are not expressly delegated to the Federal Government are reserved to the States, or to the people. Accordingly, I am not convinced that regulating the use of polygraphs should be a matter of Federal law, especially when most State governments have already taken the initiative on this issue.

Thirty-one States have enacted polygraph regulatory legislation. It is possible that many others will do so. While it is clear that the polygraph is a controversial instrument, I am convinced that the approach taken by the House of Representatives goes too far and undermines the hard and careful work that the States are doing to develop their own law. The heated debate among scientists and academicians regarding the validity of the polygraph is evidence that this issue has not been resolved to the point that any national policy should be formulated.

Mr. Chairman, further, it has traditionally been within the authority of the States to regulate commerce within their boundaries. For instance, States have mechanisms to certify that those who deliver health care services to residents are qualified to do so.

State governments regulate insurance companies and real estate brokers in order to set standards for the services they deliver. The services offered by polygraph examiners are well within the ability of States to regulate, as is evidenced by the majority of States which have already enacted polygraph legislation.

Mr. Chairman, I have received a copy of a letter from Assistant Attorney General John Bolton which expressed the views of the Justice Department on this issue. In that letter Mr. Bolton asserts, and I quote: "Polygraph misuse may be more appropriately deterred by restricting the conditions under which polygraphs are administered rather than prohibiting their use altogether. The States are better equipped to make those determinations."

Mr. Chairman, I ask unanimous consent that a copy of this letter be placed in the record following the conclusion of my remarks.

The CHAIRMAN. Without objection, we will do exactly that.

Senator THURMOND. Mr. Bolton suggests that States can provide avenues for appeal if someone feels his or her rights have been violated. States also can regulate the kinds of questions that are asked during polygraph tests, the equipment that is used, and the qualifications of examiners.

Mr. Chairman, this is an important issue, and I look forward to hearing from representatives of all affected parties before this committee considers this bill. Regrettably, scheduling conflicts prohibit me from remaining for the entire hearing. However, I intend to review the written transcript of this hearing at a later time.

Again, Mr. Chairman, I want to say the Federal Government continues to go into field after field where they do not have jurisdiction to do so. That is one reason we have such a big deficit now—about $3 trillion. The Federal Government has gone into so many jurisdictions that are reserved to the States under the Constitution. This is one field that has never been delegated to the Union; therefore, it is reserved to the States, and we should observe the Constitution or amend the Constitution to give the Federal Government that authority, which has not been done.

The CHAIRMAN. Thank you, Senator Thurmond.

[The letter referred to by Senator Thurmond follows:]

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

11 MAR 1986

Honorable Thomas P. O'Neill, Jr.
The Speaker
U.S. House of Representatives
Washington, D. C. 20515

Dear Mr. Speaker:

After careful review of H.R. 1524 and its companion bill in the Senate, S. 1815, the Department of Justice has concluded that enactment of this legislation, even with the changes previously suggested by the Administration, would usurp private-sector decisionmaking and is contrary to principles of federalism. Therefore, the Department urges the House to reject H.R. 1524 when it is brought to the floor for a vote.

We know of no compelling reason why the federal government, or any level of government, should preclude private employers from using polygraphs. This Administration firmly believes that the terms and conditions of private employment, to the maximum extent possible, should be decided in the private marketplace. Government should not challenge an employer's judgments on the credibility of employees or prospective employees, however determined, absent some proof of impermissible discrimination. Even H.R. 1524, by its exemptions for drug theft or diversion, recognizes that polygraphs serve a useful purpose for some employers.

Moreover, important principles of federalism mandate that we do not intervene in matters that have traditionally been the responsibility of the states, and in which there is no overriding need for national policy uniformity. On the contrary, given that the scientific and legal boundaries of the polygraph issue are in a state of flux, it appears to be an appropriate area in which to allow the states to experiment with their own approach to any perceived problems. Nearly half the states have enacted laws regulating polygraphs, thus demonstrating the clear ability of states to handle this issue. Moreover, polygraph use is well outside of the traditional bounds of controversies related to terms and conditions of employment, an area largely preempted by the federal government.

Although referred to as a 'lie detector,' the polygraph itself does not detect lies. The polygraph is an instrument that measures a variety of physiological responses of an individual undergoing questioning. These measurements assist an examiner in forming an opinion as to whether the individual has given truthful or deceptive answers to particular questions.

Numerous scientific studies have attempted to quantify the accuracy of polygraph examinations. Because there are differences in the skills of particular polygraph examiners, and in the types of inquiries they are asked to undertake, the results of the studies have varied. The overwhelming majority of studies, however, show accuracy rates for polygraph examinations within the range of 70 to 95 percent. These results reflect a clear scientific consensus that the polygraph can produce statistically significant indications of deception and non-deception. In fact, the polygraph has long been used to good effect as an investigative tool by the federal government. Consequently, the Justice Department has traditionally supported the use of the polygraph as an adjunct to the normal interview and interrogation process in certain kinds of matters within its investigative jurisdiction.

> . . .with proper ethics by the polygraph examiner and tight administrative control by the user agency, there is no question but that the polygraph can be a valuable investigative aid to supplement interrogation in selected criminal and national security cases. Interrogation is a basic tool of any investigative agency and the FBI considers the polygraph technique a thorough and specialized interview procedure in which a skillful interrogator is attempting to simply ascertain the truthful facts from a consenting individual regarding a matter in which we have jurisdiction.
>
> In some instances suspects will admit deception and furnish confession and or signed statements. In most instances valuable new information or investigative or investigative direction is developed as a result of the examination and followup interrogation._/

The Justice Department, however, has opposed the use of polygraph examination results in criminal trials as evidence of guilt or innocence for several reasons. First, a defendant could seek out "friendly" examiners, taking several tests until he

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_/ Statement of Bell P. Herndon, Supervisory Special Agent, FBI. The Use of Polygraphs and Similar Devices by Federal Agencies, Hearings Before the House Committee on Government Operations, 93rd Cong., 2d Sess. (1974) at p. 419.

passed one and then seek to use that favorable result as evidence of innocence. Because of Fifth Amendment considerations, the prosecutor could not obtain the other examinations without the consent of the accused. Second, there is a substantial likelihood that the jury would give undue weight to polygraph results, ultimately displacing its own role as trier of guilt or innocence. Finally, attempts to introduce polygraph evidence could greatly increase the length of criminal trials in order to accommodate the necessary expert testimony. None of these considerations apply when the polygraph is used as a screening or investigative tool.

Polygraph misuse may be more appropriately deterred by restricting the conditions under which polygraphs are administered rather than prohibiting their use altogether. The states are better equipped to make those determinations. For example, Wisconsin provides procedures for the appeal of allegedly unfair testing and carefully controls the disclosure of results. Other states prohibit examiners from asking certain classes of questions, such as those dealing with political beliefs or sexual practices. Finally, many states require that polygraphs be administered only by licensed examiners.

Because the polygraph can frequently provide accurate information about a person's veracity, the federal government should not prohibit its use by non-government employers. Again, rather than a flat nationwide ban on polygraph use, the uses of, and safeguards surrounding, polygraph use should be resolved on a case-by-case, state-by-state basis to permit maximum flexibility. There are a wide variety of private-sector jobs that may require employers to take appropriate security precautions to insure against theft or industrial espionage. Certainly, stringent security precautions may be necessary for employees who work in jobs affecting public health and safety, _e.g._, technicians at nuclear power plants, airline pilots or those who work with narcotics and dangerous drugs. Moreover, we should not be indifferent to the plight of other employers, such as retailers who want to take prudent steps to ensure that their inventory does not disappear at the hands of their own employees.

Given the benefits of polygraph use and the ability of the states to protect adequately against any polygraph misuse, a nationwide ban on polygraph use is inappropriate. Consequently, the Justice Department opposes H.R. 1524.

The Office of Management and Budget advises us that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Jol R Bolton

John R. Bolton
Assistant Attorney General

cc. Honorable Orrin G Hatch
United States Senator

Honorable Strom Thurmond
United States Senate

The CHAIRMAN. Senator Wallop.

Senator WALLOP. Mr. Chairman, thank you.

I confess that I, too, cannot understand why the issue of a Federal polygraph law is before this committee. It seems a peculiarly bizarre idea.

The bill in front of us in concept is wrong, and in detail it is inconsistent. It is not a Federal issue. The regulation of polygraph examinations in the private sector actually rests with the States, with the courts, and the private collective-bargaining process. Federal law on this matter is an intrusion.

Both the concept behind this bill and the method of implementation make for bad legislation.

What is particularly disturbing is the discriminatory approach taken by the House of Representatives on this issue. Last year, the House passed an amendment requiring the Defense Department to increase polygraph testing to guard our national security. Last month, the House passed a bill designed to ban polygraph testing in the private sector.

However, it has limited reach since so many industries made a convincing case that they should continue to utilize the polygraph. Drug manufacturers, public utility companies, security service companies, nursing homes, and day care centers are some of the industries exempt from the ban.

At the same time many other businesses that have a legitimate security problem are prohibited from using polygraphs.

Now, a man who has his life savings in a drugstore can use the polygraph to protect his inventory. But the man down the street who owns a hardware store and has his life savings in it, or a shoe store and his life savings in that, cannot.

The House bill allows polygraphs for daycare centers, but bans them for private schools. This is certainly hypocritical. On the one hand, we allow the national security agency, the CIA, the Defense Department, and other agencies to use the polygraph to conduct their investigations. Standards are set to ensure that the tests are fair and accurate. Yet we turn around and tell American companies that they cannot use the same test to protect their security.

It would seem a much more reasonable and responsible approach to let private industries use polygraph tests where they are appropriate. The States will continue to regulate this area to assure their citizens that the tests will be fair and accurate.

The Federal Government, Mr. Chairman, should not interfere in this process.

The House bill has set up a pattern of discrimination among private businesses as well as between the private and public sectors. This is the wrong course to be taking. I would hope that today's hearing will put this issue to rest, and that this legislative effort stops here.

The CHAIRMAN. Thank you, Senator Wallop.

We will turn to our witnesses now. At the outset, I would like to make a comment on a procedural matter. Because of the number of witnesses we will have appearing today, we have asked each witness to limit his or her testimony to 5 minutes. So I am going to ask all committee members to limit their questions to 10 minutes because of time constraints.

To help us all, we will be using these timing lights. When the red light flashes, we are just going to have to move on. Naturally, if there is a request, we will place an extended written statement from each witness in today's hearing record, and we will place all written statements into the record as though fully delivered.

Our first three witnesses this morning will be Senator Chic Hecht from Nevada, our colleague; and our two colleagues from the House, Congressman Pat Williams, the sponsor of the House counterpart to S. 1815, and Congressman Stewart McKinney, who has been working to ban polygraph examinations for several years.

So gentlemen, we welcome you to the committee. We will start with you, Senator Hecht, and then we will go to Congressman Williams and then to Congressman McKinney.

Excuse me. Before we begin, let me just say that Dan Quayle, an eminent member of this committee, is chairing a Defense Acquisition Subcommittee hearing this morning, so we will place his statement in the record as though fully delivered at the end of Senator Wallop's statement.

Senator **Kerry**. Mr. Chairman.

The **Chairman**. Yes, Senator Kerry.

Senator **Kerry**. I just would ask that my statement also be put in the record.

The **Chairman**. Without objection, we will place Senator Kerry's statement at an appropriate place in the record.

Senator Hecht.

## STATEMENT OF HON. CHIC HECHT, A U.S. SENATOR, FROM THE STATE OF NEVADA; HON. PAT WILLIAMS, MEMBER OF CONGRESS, STATE OF MONTANA, AND HON. STEWART McKINNEY, MEMBER OF CONGRESS, STATE OF CONNECTICUT

Senator **Hecht**. Thank you, Mr. Chairman.

In the essence of time, Senator Thurmond and Senator Wallop expressed my views completely, and I ask that my statement be included in the record on how this particular piece of legislation will affect my State.

I thank you for your courtesy.

The **Chairman**. Well, thank you, and we will place that in the record.

[The prepared statement of Senator Hecht follow:]

Statement of Senator Chic Hecht
before the
Senate Labor and Human Resources Committee
April 23, 1986

Mr. Chairman:

I want to thank the Labor and Human Resources Committee for convening this hearing today and for allowing me the opportunity to discuss an issue of profound importance to my constituents; Senate bill 1815, which seeks to prohibit the use of polygraphs in the private sector.

Mr. Chairman, the importance of this issue to the employers in my State cannot be underestimated. The large amount of correspondence and personal contact I have received on this subject sets forth what I believe to be the legitimate argument of these individuals; quite simply that a polygraph prohibition could be harmful to the continued viable functioning of their businesses.

It is my understanding that a polygraph instrument, used as an appropriate investigative and employee-screening tool and administered by a licensed examiner, provides employers with a necessary deterrent to such relevant potential work place problems as employee theft, on-the-job drug or alcohol abuse, and company record falsification, to name but a few.

While Nevada employers from a number of fields have contacted me, I recognize as primarily important the apprehension toward a polygraph ban expressed by representatives of the gaming industry in my State.

As gaming is the main industry in Nevada, and in view of the fact that the equitable, state-regulated, use of polygraphs, in concert with other methods, is relied upon to ensure the integrity of prospective and current employees, as well as overall operations, I am concerned that a prohibition on such examinations could be detrimental to the State as a whole.

Accordingly, I ask that during consideration of Senate bill 1815 the Chairman and other members of the Committee take into account the concerns expressed by myself and the residents of Nevada pursuant to the ramifications which a private sector polygraph ban could have on the entire economy of the State of Nevada

Thank you Mr. Chairman.

The CHAIRMAN. Congressman Williams.

Mr. WILLIAMS. Thank you very much, Mr. Chairman.

Your legislation, jointly introduced with Senator Kennedy, has, as did its companion bill in the House, one primary goal, and that is to limit the epidemic use and the epidemic growth of lie detector testing in the American workplace.

The American Polygraph Association estimates that last year more than 2 million polygraph tests were given. The number of tests has tripled in just these past 10 years. In America, we are witnessing an explosion in the use of this lie detector gadget.

Most Americans believe that the bulk of these tests are being given by the FBI or the CIA or NSA, or perhaps their State or local police departments. But the fact is that 98 percent of these 2 million tests are given by private business. Approximately three-quarters of these tests are given for preemployment testing and the rest are given to investigate current workers.

On March 12, as you know, the House passed my bill by a vote of 236 to 173. The success in the House was frankly due to bipartisan support, and that was led by Representative McKinney on my left, Jack Kemp, and Jim Courter.

Your bill fully accepts, as did mine, the previous decision of this Congress to allow careful, limited and specific use of polygraphs by the Federal Government in matters pertaining to our national security and public health.

In attempting to achieve symmetry with the exemptions in the public sector, the House bill, as amended, provides cautious exemptions for those private businesses whose enterprise takes them into matters affecting our national security or public health.

For example, we accepted amendments to provide exemptions regarding dangerous drugs, security guards, and the protection of electric and nuclear powerplants. I invite this committee's careful consideration of all those amendments. I urge you to review each of them with an eye toward protecting the national security.

I particularly want to draw your attention to two amendments, one pertaining to the care of children and the elderly, and the other concerning the exemption of all electric and generation transmission facilities. In my judgment, those two amendments are questionable, and I urge you to review them carefully.

As you know, the House-passed bill does not place a total ban on the use of lie detectors. But we believe it does halt the epidemic. The bill protects workers who are wrongfully denied employment and whose careers are being devastated based on the results of these questionable tests. In fact, tens of thousands of workers are wrongfully denied employment every year, either because they refused to take the tests or because of the inherent inaccuracy of the machines or the gadgets' operators.

Through the years, States have made sporadic efforts to control the use of this gadget. Now, 31 States and the District of Columbia have passed legislation affecting their use in the private work force. However, these laws have simply not proven effective. They have, in fact, fueled the epidemic.

Often, employers undermine State law by pressuring employees and jobseekers into "volunteering" to take a test, even when the State law prohibits requiring or requesting an examination. In

States that completely ban the use of lie detectors, employers may avoid the law by hiring in a neighboring State which permits examination and then transferring the employee into the State where such testing is prohibited.

It is clear now that State regulation has been perceived as the seal of approval on the gadget, and has thus resulted in the explosive rise to 2 million tests in the past 10 years.

Our criminal justice system presumes that an individual is innocent until proven guilty. The lie detector abuses that principle by requiring America's workers to prove their innocence. The courts in this country refuse to admit polygraph results as evidence in trials. It is sadly ironic, and it is wrong, that criminals are protected from this gadget, but America's workers are not.

I look forward, Senators, to working with you on this bill, hopefully in conference committee early this summer, and I thank you very much for giving us the opportunity to come before you and testify this morning.

The CHAIRMAN. Thank you, Congressman Williams. We appreciate your testimony.

Congressman McKinney, we are happy to have you here as well.

Mr. McKINNEY. It is very nice to be here, Mr. Chairman, and I want to thank you for the chance to testify about this.

I will, with your permission, insert my statement in the record and just say a few words.

The CHAIRMAN. Without objection.

Mr. McKINNEY. I have been told over and over and over again, unfortunately even by some of the distinguished members of this committee, that there is no Federal interest in this machine. There is a Federal interest in civil rights, for American civil rights related to private employment are being destroyed all over the United States.

When Ed Koch left the House of Representatives to become mayor of the city of New York, he handed me an antipolygraph bill. That was a long time ago. I asked him the other day if he changed his stance on opposing the polygraph because of his recently departed friend from Queens, and he said no, because it is inaccurate.

I have served on a congressional committee, the Assassinations Committee that looked into the terrible murder of Martin Luther King and looked into the assassination of John F. Kennedy. Three polygraph tests were given to James Earl Ray. They all came out with different results.

So how can we give any credence to this machine? What would ever happen if we wandered through these halls and gave polygraph tests of felicity, love and hard work to all of our staff?

The fact of the matter is the machine is not accurate; it can be beaten constantly; it makes mistakes. I suggest to all of you, because I know you are as interested as I am, that it is one more mechanical incursion into the civil rights of free Americans. It predisposes one's guilt. In this country, we are innocent until we are proven guilty.

I would hope that the Senate would not get railroaded the way the House did. In its original version, my bill severely dealt with polygraph misuse, and I would hope that you remember that every exception you make just gives this mechanical monstrosity more credence.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. McKinney and responses to questions submitted by Senator Hatch follow:]

### PREPARED STATEMENT OF CONGRESSMAN MCKINNEY

Mr. McKINNEY. I want to thank the distinguished Chairman for the opportunity to appear before the Committee on Labor and Human Resources to testify on behalf of polygraph legislation. As you know, I have long advocated the prohibition of polygraph testing in private industry, and am pleased to the ultimate degree that this Committee is seriously considering the matter.

Mr. Chairman, I am not going to relate the details of the House passage of polygraph legislation; I am sure that you and the Committee are aware of them. I am not going to spend time on the defects of mechanically detecting whether someone is truthful or deceitful; I am sure that the unreliability and invalid conclusions of polygraph tests will be discussed in length during the course of this hearing. I am not even going to mention how thousands and thousands of polygraph tests are administered every year, time and time again labeling innocent people as liars or social misfits. I am sure you will hear later about real life stories of the many lie detector victims being forced to leave jobs unnecessarily, or wrongly being denied employment, or being discriminated against because of a physicial condition or racial background.

Instead, Mr. Chairman, I want to take this opportunity to express my personal outrage over the ridiculous and insidious practice of hooking people up to a machine, interrogating them with questions that have nothing to do with job performance, all done on the premise that one is guilty until proven innocent. I am further outraged by Congress' previous disregard of the matter, allowing this practice to go on.

This is my eighth term as a Representative and I have seen many issues come and go, and some that even go and come back. But polygraph testing in the workplace is one of those issues that Congress has never examined with specific remedial legislation before it. And yet I would be hard pressed to come up with such a seemingly harmless and ill-publicized practice as polygraph testing that adversely affects so many citizens. Citizens' Constitutional rights are being infringed upon; fair employment practices are being ignored; and not only does the practice of administering polygraph tests continue, it is increasing.

It is time that the legislative body of this country take a close look at what is happening to a countless number of citizens. I implore the members of this Committee to listen carefully to what is discussed today. It is imperative that we put a halt to the indiscriminate and discriminating use of polygraph testing.

Let me emphasize that controlling or regulating the lie detector industry is not an acceptable compromise between those who favor polygraph use and those opposed. Regulating the industry only serves to legitimize the practice of the polygraph and increases occasions of harrassment and injustice as demonstrated in various states that have established polygraph standards. The polygraph machine is a barbaric and unacceptale tool—let's acknowledge that and act accordingly.

In all likelihood, Mr. Chairman, you will hear arguments that point out that the House legislation does not prohibit polygraph use for government employees. The misleading conclusion is that if it's good for the government, it's good for private industry. Let me make it clear that the polygraph is not good for the government. The reasons why there is no government prohibition in the House bill are both practical and political. There are those who believe that the use of polygraph has to be maintained for government agencies, especially those involved in national security matters. Their concerns were accommodated. As you are aware, various amendments were attached to the House-pased bill allowing further exemptions; also accommodations. I would urge the members of this Committee and all members of this chamber to refrain as much as possible from providing unnecessary exemptions in the Senate version.

Mr. Chairman, my outrage over this issue has somewhat abated since the House action on this matter. But polygraph abuse continues, and more and more people are being harmed. I implore you to do all you can to expedite Senate polygraph legislation so that we can soon end polygraph testing in private industry.

STEWART B. MCKINNEY
4TH DISTRICT, CONNECTICUT

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May 15. 1986

The Honorable Orrin G. Hatch
Chairman
Senate Committee on Labor and Human Resources
SD-428
Washington, D.C. 20515

Dear Orrin:

I welcome the opportunity to respond to the questions posed by Senator Quayle regarding polygraph legislation. It is imperative to dispell any doubts about the merits or necessity of prohibiting polygraph testing in private industry.

1) The federal government should regulate hiring and firing when citizens' constitutional rights are being violated and state laws are inadequate in rectifying or preventing violations.

2) Such regulation should be left to the states unless states are not properly protecting citizens' constitutional rights from being violated.

3) The federal government should prohibit polygraph testing because thousands of innocent people every year are being denied employment due to erroneously being labeled as "undesirable" or "dishonest." The machine is unreliable, inaccurate, infringes upon one's right to privacy and presupposes that one is guilty until proven innocent. State laws regarding polygraph testing have led to a proliferation of testing and a proliferation of citizens becoming unfortunate victims of mechanical tyranny. Federal law is desperately needed.

4) Evidence overwhelmingly indicates that the polygraph has no place deciding who should or should not work for a particular company. The machine simply does not work.

5) My first preference would be to prohibit polygraph use in any forum. Because of political and practical reasons, however, it is necessary to make a limited number of exemptions in order to gain support for anti-polygraph legislation.

6) I believe that no industry or business should receive an exemption. As I have stated, compromises are necessary to gain support for anti-polygraph legislation.

7) Again, if this were a perfect world, polygraph testing would not be allowed even in matters of national security. However, one has to admit that tests given in these situations are much different than those rendered in private industry. In addition, polygraph testing is only one segment of performing security checks.

8) Day care centers and nursing homes should not be permitted to use polygraph tests.

9) Each of the categories mentioned are areas where violations of employee rights or civil rights can occur. Again, when state regulations fail to protect civil rights, federal regulation must and has been legislated. For example, there is pending legislation concerning working with hazardous substances, the High Risk Occupational Notification and Prevention Act. With regard to workers compensation, the federal government does regulate some of these programs. There are federal laws regarding whistle blowing if a worker is not being paid overtime or minimum wage. With regard to wage garnishment or assignment, the federal government garnishes one's IRS return if child support payments are delinquent. There are times when it is necessary for the federal government to step in to protect the rights of our citizens. Prohibiting the polygraph in the workplace is one of those necessary times.

Thank you for the opportunity to elaborate on my position regarding polygraph legislation.

Sincerely,

Stewart B. McKinney, M.C.

The CHAIRMAN. Thank you both. We appreciate your coming over to the lesser body and giving some testimony here today. We appreciate your efforts and integrity and enjoy working with you, as you know, on the various committees.

Do you have any questions, Senator Kennedy?

Senator KENNEDY. We will hear a number of requests for exemptions. Each of you have touched on exemptions. The House accepted some. And I think there have been already a number of industries and parts of the private sector who have indicated that they want exemptions as well.

What criteria do you think ought to be applied for the Senate, and whether to have any exemptions?

Mr. WILLIAMS. Senator, in the House, we recognize that the Congress of the United States earlier decided that the public sector should be allowed to use the polygraphs when the nation's health and security were deemed at potential risk. Thus, we decided that if this bill were to have logic, it needed to create a symmetry between how the private sector used polygraphs and how we allow the public sector to use them.

So we exempted very cautiously and specifically some of the private sector. For example, we allow the private sector to polygraph anyone who has direct access to dangerous drugs, those drugs under schedules I through IV. We allow the private sector to polygraph any security guards who are guarding such facilities as nuclear powerplants, certain public transportation, and America's water supplies, because we believe that that is in the best interest of the Nation's health and security.

However, I would encourage the Senate to place certain restrictions even on those industries or those parts of the private sector. We require those private sectors to adhere to whatever agreements they have made under collective bargaining. For example, if the employer and the employee have agreed that lie detectors will not be used, then our bill respects that and does not override it.

By the same token, we respect State law. We do not override State law.

I would just encourage you to establish some symmetry between what the public sector is allowed to do and what the private sector is allowed to do, and that is to protect the health and safety of the United States.

Senator KENNEDY. Well, wouldn't the logic of your position—if it does not work on individuals, why should there be any exemptions?

Mr. WILLIAMS. We do not allow the lie detector to be the sole screening instrument used. That is not allowed in the public sector, and we do not allow it in the private sector. But, we do think that even with all its faults, it might be beneficial to have it as one more screening device, along with all the others that both the public and private sector might see fit to use.

I think that the majority in the House believes that if the lie detector were the only device used against terrorism in the United States, or to protect the health and safety of U.S. citizens, then we would in fact be endangering the very thing we are trying to protect, because, quite frankly, Senator, a terrorist can go through a lie detector like water through a sieve.

But as one more device, one more effort to protect this country, we thought that its use under very strict conditions was appropriate.

Senator KENNEDY. Congressman McKinney.

Mr. MCKINNEY. Well, I am far more negative toward the machine, but I would agree with everything my colleague said about State laws and Federal law and the symmetry between the two. I just think that in the back of your minds constantly has to be the fact that private employers have used this machine in a violation of civil rights in thousands and thousands of examples, many of which you will hear today.

Senator KENNEDY. Thank you.

I have no more questions, Mr. Chairman. Thank you.

The CHAIRMAN. We want to thank both of you for appearing.

I am sorry—Senator Kerry.

Senator KERRY. Just one question, I think.

How do you respond to the issues raised by Senator Wallop, Senator Thurmond and others with respect to federalism, that this issue does not belong here, that it is inappropriate for the Federal Government to be intruding on what the States can resolve?

Mr. WILLIAMS. The people of the United States discovered long ago that there are some problems in this country, due to its makeup and the nature of the political system, problems which require Federal solutions.

We have waited many decades for the State to resolve the problem of misuse of the lie detector gadget. Thirty-one States and the District of Columbia have either banned the gadget, or have attempted to control it in some way.

What has the result been? An explosion in the use of the gadget. And that is, in my judgment, frankly, because private industry, and to some degree the public sector, is snookered by State legislatures that regulate this gadget into thinking that that is the State legislature's seal of approval, and also that that seal of approval somehow legitimizes the gadget and makes its results valid.

So once a State regulates lie detectors, we see the use of that gadget explode in that State.

There is also, of course, Senator, the problem of people crossing State lines. Employers are requiring their employees to cross State lines, move into a nearby State, take the test, and then come back into the State where the business is located, but the test is banned. In order, of course, to prevent that movement across State lines to avoid the law, we have learned long ago that a Federal solution is needed.

Mr. MCKINNEY. And I think my colleague's argument is very, very clear for this city and very clear for the city of New York. But I would say, Senator, that I think there are so many problems that are Federal in nature, such as an individual's right to privacy—some of the questions asked are mind-bogglingly bad—the individual's right to be innocent until proven guilty, instead of guilty and then having to prove one's innocence. You can go right on through this list, and it really comes down to a civil rights question.

Senator KERRY. And one final question, just picking up a little bit off of Senator Kennedy's question. I happen to support your position, but I think it has still been left a little bit unclear, and I would like you to perhaps clarify it.

Why, if this is a useful tool for the exceptions which have been exempted, and why if it is a useful tool for security purposes and other—as a tool—why do those who argue it ought to be our tool also within the private sector not have legitimacy in saying it can just be a useful tool, set up the restrictions, and we will treat it in the same manner as it is treated in those other areas?

Mr. WILLIAMS. Well, Senator, you have found as Senator Kennedy did, the obvious weakness in the bill, and you have expressed it very well.

If the Senate wants to ban the lie detector gadget in both the public and private sector, I am going to support that position in the House. But I suspect that that position can pass neither the Senate nor the House. Therefore, we should be political realists and say we will allow the public sector, as we do now, to use this gadget, although flawed as only one of its screens to protect the health and safety of the United States. By the same token, we will pass a law that establishes symmetry and allows the private sector to use this gadget as just one of its screens to protect the health and safety of the United States.

The CHAIRMAN. Senator Kennedy?

Senator KENNEDY. I know you have to run, but are you suggesting therefore that in the areas of the greatest danger, or that might be considered the greatest danger in terms of security or health, and where there are a minimum number of workers who are involved, that the danger in terms of the discrimination or the abuse of this would be potentially much more limited? And if you are going to carve out various areas it ought to be in the areas of highest threat, I imagine is what you are talking about, either from a security point of view or from a public health point of view, and would impact the fewest number of people?

Mr. WILLIAMS. That is correct, Senator, but I have estimated that the bill as amended in the House and sent to the Senate, and I understand it is not the bill you are starting with in this committee since you are starting with your own bill, as you should, is estimated to stop 90 percent of the individual uses of the lie detector in the United States. The remaining 10 percent are in those industries that hire a few people, are guarding nuclear powerplants, guarding the Nation's water supply and so on.

So your analysis of those amendments is correct.

The CHAIRMAN. Let me ask one question. Something that has bothered me: as you can imagine, after we filed this bill, we have had almost everybody who uses the lie detector test come to us and try to justify their utilization of it. One of the points that was made, though, I find intriguing is that—and I have made the comment that you cannot have, in my opinion, accuracy in a lie detector test with a 5- to 15-minute examination; you just cannot. There is a real question whether you can have it even if you do the 3 or 4 hours that generally would be required for a really positive and a really appropriate test.

But one of the things that kept cropping up is that there is such widespread drug use in this country, in some of these industries—for instance, I had a brewer come to me, saying, "We just simply cannot allow heavy use of drugs to be in the brewery industry where they are going to couple that with alcohol." In some of the public carrier areas, they have found that—in fact, one of them said,

> As far as marijuana usage, we do not even worry about that, it is so widespread in this country; but we are worried about the hard drug usage and the safety of the highways. And the only way we can screen these people, or the best way we can, is with the polygraph examination.

And then they said,

> And you know, what is interesting is we do not even rely upon the analysis. The mere fact that they know they have got to go through a polygraph examination causes them to tell the truth about drug use, felonies, prior convictions, and so forth.

How do you handle that? We do not want to have unsafe highways; we do not want to have unsafe pharmaceutical companies, which your bill would take care of; we do not want to have unsafe breweries, et cetera—you could expand that ad infinitum.

How do you solve that problem?

Mr. McKinney. Very simply. I happen to be the father of a recovering drug addict, and I would just simply tell you that the polygraph is the most inaccurate and useless tool to find drug use that I have ever seen.

The Chairman. All right.

Do you have any comments, Congressman Williams?

Mr. Williams. Private industry should not have to rely on intimidation, but rather on a good personnel department to find prospective employees who will turn out to be good, honest employees.

It seems to me that if business does not trust someone, they should not hire them, and once they hire them, they should trust them.

The Chairman. All right. We want to thank you both for being here. Thanks for coming.

Mr. Williams. Thank you.

Mr. McKinney. Thank you very much.

The Chairman. Our next witness will be Mr. Steve Markman, Assistant Attorney General for Legal Policy of the Department of Justice.

We are very happy to welcome Steve Markman to our committee. This committee, as well as the Judiciary Committee, is very familiar with Mr. Markman.

We welcome you to the committee. We are happy to have you here today, and we look forward to your testimony.

## STATEMENT OF STEVE MARKMAN, ASSISTANT ATTORNEY GENERAL FOR LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. Markman. Thank you very much, Mr. Chairman.

The Chairman. I hope you can summarize it in 5 minutes, Steve.

Mr. Markman. I have come to have, as the chairman knows, the greatest and inestimable affection and respect for the chairman of this committee. He has been my mentor and tutor. So it is only with the greatest hesitation and humility that I testify today on behalf of the Justice Department that there may be shortcomings in the pending legislation.

The CHAIRMAN. Now, that is a fine repayment for 7 years of working with me on Capitol Hill. [Laughter.]

The CHAIRMAN. Go ahead.

Mr. MARKMAN. I appreciate the opportunity to appear here on behalf of the Department of Justice, at this hearing on S. 1815, the proposed Polygraph Protection Act of 1985. This bill, if enacted, would prohibit private sector employers from administering polygraph examinations to employees or prospective employees.

The Department of Justice vigorously opposes federalizing the law in this area. Such action is directly contrary to the principles of federalism on which our Union is based, and to which this administration is deeply committed.

Until now, regulating polygraph use has been the responsibility of the States. In fact, 35 States have enacted statutes regulating the use of polygraph or other honesty tests for polygraph examiners. To preempt the States in this context, where there is no evidence of an overriding need for national policy uniformity, would do violence to an important underlying principle of our Union—the belief in the ability and responsibility of the States generally to govern the affairs of their citizens.

The attempt to federalize the law in this arena has implications far beyond polygraph regulation. It is symptomatic of the persistent tendency of government officials in Washington, well-meaning officials, to act as if only we can fully understand the remedy to problems confronting 240 million Americans. It is this attitude that, in recent decades, has been responsible for the mushrooming growth of a National Government that has not only undertaken unmanageable responsibilities but that also has usurped the decisionmaking authority of private decisions and of the levels of government closest to those citizens, the States and their localities. It is an attitude that is responsible for a steady succession of constitutional debates within this country on Gramm-Rudman, on balanced budget constitutional amendments, on item veto initiatives, on constitutional amending conventions, and on other means of stemming the growth of the National Government.

This centralizing tendency is not difficult to understand. It is not surprising that public officials and other citizens who believe that their public policy ideas are sound want those ideas to be imposed uniformly upon the 50 States. It is not surprising that citizens who feel strongly about the merits of a public program want to bestow that program upon as many of their fellow citizens as possible. It is not at all surprising that a business or other private entity subject to some form of public regulation would prefer to abide by a single regulation promulgated by Washington than to have to abide by 50 separate regulations promulgated in Sacramento and Springfield and St. Paul.

It is precisely because each of us can understand the impetus toward centralization of governmental authority that we have to be particularly careful to avoid falling victim to this tendency and in the process undermining the constitutional balances within our system of government.

As with many things elemental, there is a tendency sometimes to give the principles of federalism short shrift. We recognize that it is not always easy to identify a bright line between those responsibilities of government that ought to be carried out by the National Government and those more appropriately addressed by the States. Even in this administration, which is deeply committed to ensuring that each level of government operates in its appropriate sphere, it has not always been an easy thing to draw this line. It is important, nevertheless, that those in the executive and legislative branches not lose sight of the inherent responsibility to confront this matter.

This responsibility is particularly acute given the Supreme Court's recent decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*. In that case, the Supreme Court held, with respect to Federal regulation under the commerce power, that Congress, not the Federal courts, generally is the primary protector of State sovereign rights and responsibilities. In other words, the principal burden of protecting the values of federalism in the commerce context lies with the members of this body. As representatives not only of the citizens of the States, but of the States themselves, it is the Congress that is principally vested with the responsibility to preserve the prerogatives of the States within our constitutional structure.

Whatever the merits of the court's decision in *Garcia*—and this administration opposes its holding and supported legislation prepared by this committee to modify the Fair Labor Standards Act in response—its observations on the role of the Congress in upholding federalism can hardly be disputed.

Because of their importance to this committee's decision on whether to proceed with S. 1815, I would like at this time to briefly revisit the fundamental values of federalism,

The healthy respect for the States envisioned by the framers requires that the National Government pay as much attention to who should be making decisions as to what decisions should be made and that, where appropriate, it defer to the States.

The CHAIRMAN. Mr. Markman, let us put the rest of your statement in the record. We have read it, and find it to be a very good statement.

[The prepared statement of Mr. Markman and responses to questions submitted by Senator Quayle follow:]

Department of Justice

STATEMENT

OF

STEPHEN J. MARKMAN
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

BEFORE

THE

COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

CONCERNING

S. 1815: THE POLYGRAPH PROTECTION ACT OF 1985

ON

APRIL 23, 1986

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to appear on behalf of the Department of Justice at this hearing on S. 1815, the proposed "Polygraph Protection Act of 1985." This bill, if enacted, would prohibit private sector employers from administering polygraph examinations to employees or prospective employees.

The Department of Justice vigorously opposes federalizing the law in this area. Such action is directly contrary to the principles of federalism on which our union is based and to which this Administration is deeply committed. Until now, regulating polygraph use has been the responsibility of the states. In fact, thirty-five states have enacted statutes regulating the use of polygraph or other "honesty" tests or polygraph examiners. To preempt the states in this context, where there is no evidence of an overriding need for national policy uniformity, would do violence to an important underlying principle of our union -- the belief in the ability and responsibility of the states generally to govern the affairs of their citizens.

The attempt to federalize the law in this arena has implications far beyond polygraph regulation; it is symptomatic of the persistent tendency of government officials in Washington -- well meaning officials -- to act as if only we can fully understand and remedy the problems confronting 240 million Americans. It is this attitude that, in recent decades, has been responsible for the mushrooming growth of a national government that has not only undertaken unmanageable responsibilities, but that also has usurped the decisionmaking authority of private citizens and of the levels of government closest to those citizens -- the states and their localities. It is an attitude that is responsible for a steady succession of constitutional debates within this country on Gramm-Rudman, on balanced budget and tax limitation constitutional amendments, on item veto initiatives, and on constitutional amending conventions.

This centralizing tendency is not difficult to understand. It is not surprising that public officials and other citizens, who believe that their public policy ideas are sound, want those ideas to be imposed uniformly upon the fifty states. It is not surprising that citizens who feel strongly about the merits of a public program want to bestow that program upon as many of their fellow-citizens as possible. And it is not surprising that a business or other private entity subject to some form of public regulation would prefer to abide by a single regulation promulgated by Washington than to have to abide by fifty separate regulations promulgated in Sacramento and Springfield and St. Paul. It is precisely because each of us can understand the impetus toward centralization of governmental authority that we have to be particularly careful to avoid falling victim to this tendency and, in the process, undermining the constitutional balances within our system of government.

As with many things elemental, there is a tendency sometimes to give the principles of federalism short shift. I recognize that it is not always easy to identify a bright line between those responsibilities of government that ought to be carried out by the national government and those more appropriately addressed by the states. Even in this Administration, which is deeply committed to ensuring that each level of government operates in its appropriate sphere, we have sometimes had trouble drawing that line. It is important, nevertheless, that those in the executive and legislative branches not lose sight of the inherent responsibility to confront this matter.

This responsibility is particularly acute given the Supreme Court's recent decision in Garcia v. San Antonio Metropolitan Transit Authority, 105 S. Ct. 1005 (1985). In that case, the Supreme Court held, with respect to federal regulation under the commerce power, that Congress, not the federal courts, generally is the primary protector of state sovereign rights and responsibilities. As the Court observed,

> We continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the commerce clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action -- the built-in restraints that our system provides through state participation in federal governmental action.

In other words, the principal burden of protecting the values of federalism in the commerce context lies with the Members of this body. As representatives, not only of the citizens of the states, but of the states themselves, it is the Congress that is principally vested with the responsibility to preserve the prerogatives of the states within the constitutional structure. Whatever the merits of the Court's decision in Garcia -- and this Administration opposes its holding and supported legislation prepared by this Committee to modify the Fair Labor Standards Act in response -- its observations on the role of the Congress in upholding federalism can hardly be disputed.

Because of their importance to this Committee's decision on whether to proceed with S. 1815, I would like at this time to briefly revisit the fundamental values of federalism. The healthy respect for the states envisioned by the Framers requires that the national government pay as much attention to who should be making decisions as to what decisions should be made and that, where appropriate, it defer to the states. It was the people of the states who created the national government by delegating to that government those limited and enumerated powers relating to matters beyond the competence of the individual states. All other sovereign powers, except for those expressly prohibited the states by the Constitution, are expressly reserved to the states or the people by the Tenth Amendment.

The Framers of the Constitution set up a structure that apportions power between the national and state governments. The values that underlie this structure of federalism are not anachronistic; they are not the result of an historic accident; they are no less relevant to the United States in 1986 than they were to our Nation in 1789. In weighing whether a public function ought to be performed at the national or state level, we should consider the basic values that our federalist system seeks to ensure. Some of those principles include:

Dispersal of Power -- By apportioning and compartmentalizing power among the national and 50 state governments, the power of government generally is dispersed and thereby limited.

Accountability -- State governments, be being closer to the people, are better positioned as a general matter to act in a way that is responsive and accountable to the needs and desires of their citizens.

Participation -- Because state governments are closer to the people, there is the potential for citizens to be more directly involved in setting the direction of their affairs. This ability is likely to result in a stronger sense of community and civic virtue as the people themselves are more deeply involved in defining the role of their government.

Diversity -- Ours is a large and disparate nation; the citizens of different states may well have different needs and concerns. Federalism permits a variegated system of government most responsive to this diverse array of sentiment. It does not require that public policies conform merely to a low common denominator; rather, it allows for the development of policies that more precisely respond to the felt needs of citizens within different geographical areas.

Competition -- Unlike the national government which is necessarily monopolistic in its assertion of public authority, the existence of the states introduces a sense of competition into the realm of public policy. If, ultimately, a citizen is unable to influence and affect the policies of his or her state, an available option always exists to move elsewhere. This option, however limited, enhances in a real way the responsiveness of state governments in a way unavailable to the national government.

Experimentation -- The states, by providing diverse responses to various issues which can be compared and contrasted, serve as laboratories of public policy experimentation. Such experimentation is ultimately likely to result in superior and in some instances naturally uniform policies, as states reassess their own and other states' experiences under particular regulatory approaches.

Containment -- Experimenting with varying forms of regulation on a smaller, state scale rather than on a uniform, national scale confines the harmful effects of regulatory actions that prove more costly or detrimental than expected. Thus, while the successful exercises in state regulation are likely to be emulated by other states, the unsuccessful exercises can be avoided.

While these values of federalism may often mitigate in favor of state rather than national action, other factors -- including a demonstrated need for national policy uniformity or for a monolithic system of enforcement -- mitigate in favor of action by the national government and must be balanced in this process. For example, the need for a uniform foreign policy on the part of the United States clearly justifies national rather than state action in this area. Similarly, in the interstate commerce area, the need for a uniform competition policy argues strongly for national antitrust law; and the need for efficient flow of interstate transportation argues for national rather than state regulation of airplane and rail safety. In other words, by federalism, we are not referring to the idea of "state's rights"; rather, we are referring to the idea expressed in the Constitution that certain governmental functions are more properly carried out at the level of the fifty states, while others are more properly carried out by the national government.

While reasonable individuals may well differ on the direction in which these and other factors of federalism point -- and that may well be the case in the context of S. 1815 -- it is nevertheless critical that we not lose sight of the need to go through this analytic process.

When these factors are examined in the context of polygraph regulation, the balance in the Administration's judgment is clearly struck in favor of state, not national, regulation. Not only is there no need for national enforcement or uniformity with respect to private sector polygraph use, but the benefits of leaving regulation to the states are evident; polygraph regulation is a complex issue, subject to extensive ongoing debate, in which a substantial number of reasonable responses are available to (and have indeed been adopted by) the states.

Whether or not polygraphs should be regulated by some level of government is not the issue here. Assuming that polygraphs are abused by private employers -- and there is no question that such abuse is possible -- the states are as capable as the national government of recognizing and remedying any such problem. In fact, they have the greater incentive to do so since the rights of their own citizens, to whom they are immediately accountable, are involved. As I indicated earlier, 70% of the states have already recognized a need for certain protections in this area and have provided them through various forms of state legislation.

There are a number of interests that must be balanced in determining whether or how to regulate polygraphs. For example, while certain employees may be concerned about the intrusiveness of polygraph regulation, other employees -- for example, employees falsely accused of stealing from their employers -- may desire the availability of polygraph tests in order to establish their innocence.

Moreover, by protecting employees from the use of polygraph tests, employers are necessarily restricted in their use of a test that may help ensure they are hiring honest or firing dishonest employees. No one can dispute the need for identifying and discharging dishonest or thieving workers. From losses reported during a recent random sampling of three industries -- retail department store chains, general hospitals, and electronic manufacturing firms -- the National Institute of Justice estimated that business and industry lose to employee theft five to ten billion dollars annually. Not only are employers losing valuable assets and paying higher prices for theft insurance policies, but, to the extent possible, employers pass on those costs in the form of higher prices to consumers. Some of the commodities diverted -- drugs, for example -- impose their own costs on society. According to the Drug Enforcement Administration, legally produced drugs, falling in the wrong hands, kill and injure twice as many people annually as illicit drugs. DEA estimates that half a million to a million doses of drugs are stolen each year by employees of pharmacies and wholesale drug manufacturers and distributors.

Those opposed to the use of polygraphs will argue that the test is inaccurate and cannot provide employers with useful information. Certainly, the validity of polygraphs has been widely debated during the last two decades. The scientific community itself is divided. One camp, led by Prof. David C. Raskin of the University of Utah published, in 1978, a study assessing polygraphs to be 90 percent accurate, when properly conducted and evaluated. The opposing camp, led by Dr. D. T. Lykken of the University of Minnesota, claims that the test is much less accurate and that it works to screen out the most honest, most conscientious employees. As the dissenters in the House Committee on Education and Labor indicated in their report on the companion bill to S. 1815, "Field studies are difficult to validate, and 'laboratory' studies cannot exactly replicate polygraph usage. The Office of Technology Assessment (OTA) in a 1983 report concluded that 'no overall measure or single, simple judgment of polygraph testing validity can be established based on available scientific evidence.'" What is essential to recognize here is, not that one side or the other has satisfied the burden of persuasion, but that the current debate is an ongoing and vigorous one.

Apart from the debate in the scientific community, a number of employers obviously believe that polygraphs are useful devices for aiding tnem in making responsible decisions about existing or prospective employees. According to the House Committee Report on H.R. 1524, more than two million polygraph tests are administered in the private sector each year, triple the number given ten years ago. From an economic perspective, it seems highly unreasonable to believe that employers would incur the cost of $50-$60 per test and risk generating some bad will among valuable or potentially valuable employees, and perhaps losing them to competitors, if those employers did not believe the tests provided useful information. Moreover, it must be remembered that the alternatives to polygraph tests -- for example, background checks and personal interviews in the preemployment screening context -- may be far more highly subjective and may intrude upon privacy interests in at least as substantial a way. The value of polygraphs, therefore, should be analyzed not by some unattainable, ideal standard, but with reference to existing, real-world investigative alternatives. Again, these are considerations as to which different citizenries in different states may reasonably come to different conclusions.

S. 1815 itself takes an inconsistent stand on whether polygraph tests are sufficiently valid to be useful. While the bill would ban the use of polygraphs in the private sector, in large part because of the inaccuracies of the test, it explicitly recognizes the usefulness of polygraphs for the government by continuing to allow polygraph testing of all governmental employees. Certainly if the machines are reliable indicators of truth or falsity in the public sector they are equally as reliable in the private sector.

Apparently a majority of the Members of the House of Representatives also believes that polygraphs are useful in a variety of private sector contexts. When H.R. 1524 went to the floor on March 12, it contained a single exemption for companies involved in the storage, distribution, or sale of controlled substances. One representative after another offered amendments exempting various industries from the bill's blanket prohibition. The bill passed the House containing not only the original exemption, but also exemptions for workers in nursing homes and children's day care centers, security personnel, and public utility employees. From these exemptions it is clear that the very representatives who have voted to bar the use of polygraphs seem to recognize their usefulness and credibility in certain contexts.

More than that, however, these exemptions again highlight the arbitrary nature of decisions on which occupations to exempt. If polygraphs provide benefits to employers in the armored car industry, it is difficult, if not impossible, to understand why banks (where 84% of losses are attributed to employee theft) or the legal gaming industry (where large sums of money change hands and policing of employees is extremely difficult) are not entitled to the same benefits. Likewise, if polygraphs are useful to protect employers and the public from prospective employees seeking sensitive positions involving the distribution or sale of controlled substances, they would seem to be equally useful for screening prospective employees for other sensitive positions, such as airport security personnel and truck drivers transporting munitions and other hazardous materials.

What all of this indicates is that polygraph regulation is a complex and emotional issue which poses a number of questions with no definitive answers. It is an issue which requires careful balancing of the interests of consumers, employees, and employers. Possible responses range from relying on the free market, to licensing polygraph examiners, to banning completely the use of polygraphs. While all sorts of variations on these approaches are possible, which precise approach is best for any given state should be left to the citizens of that state. We see no reason to forestall the vigorous debate on the issue continuing to take place within the states.

In fact, those states that have regulated in this field have adopted widely varying approaches. Nineteen states and the District of Columbia regulate employers' use of the polygraph; three states regulate employers' use of other "honesty testing devices." Some of these states completely ban the use of polygraphs by private employers; others prohibit employers from requiring employees to take the tests, but allow them to be administered to employees who volunteer to take them; still others exempt certain occupations -- ranging from police and firefighters to jewelers to pharmaceutical companies -- from the ban. Six of these states additionally regulate polygraph examiners. Of those states that do not directly regulate employers' use of polygraphs, thirteen regulate polygraph examiners -- some requiring licensing, some limiting the types of questions that can be asked to employees. This diversity, with the alternatives it provides to citizens -- some of whom are vigorously opposed to polygraph use and some who are its adamant supporters -- and the ability to experiment with different approaches it allows, is one of the primary reasons the Framers of our Constitution created a two-tiered system of government, with much of the regulatory authority remaining with the states.

While the Department of Justice strongly opposes this bill in its entirety, or any other attempt to federalize this field, the bill is problematic by its own terms. For example, the current exemption for Department of Defense contractors -- included to protect sensitive national security interests -- is not adequate to protect all important national security matters. In addition to the Department of Defense, a number of other departments and agencies -- including the Central Intelligence Agency, the Departments of Energy, State and Treasury, the Federal Bureau of Investigation, and the National Security Agency -- would require exemptions pertaining to certain contractor employees.

Again, however, I reiterate that merely fixing this or other more minor problems would not be sufficient to remedy the fundamental defect of this bill -- federalizing an area of law best left to the states.

I would like to conclude my remarks with a quote from President Reagan. In an address to the National Conference of State Legislatures on July 30, 1981, he stated:

> Today federalism is one check that is out of balance as the diversity of the states has given way to the uniformity of Washington. And our task is to restore the constitutional symmetry between the central government and the states and to reestablish the freedom and variety of federalism. In the process, we'll return the citizen to his rightful place in the scheme of our democracy and that place is close to his government. We must never forget it. It is not the federal government or the states who retain the power -- the people retain the power. And I hope that you'll join me in strengthening the fabric of federalism. If the federal government is more responsive to the states, the states will be more responsive to the people . . .

For the reasons so eloquently articulated by President Reagan, I urge that this bill not be enacted.

**U.S. Department of Justice**

Office of Legal Policy

Assistant Attorney General

*Washington, D.C. 20530*

May 12, 1986

The Honorable Orrin G. Hatch
Chairman
Committee on Labor and Human Resources
United States Senate
135 Senate Russell Office Building
Washington, D.C. 20510

ATTN: Kay Morrell

Dear Mr. Chairman:

Enclosed is a corrected copy of the portion of the hearing transcript concerning my April 23 testimony, on behalf of the Administration, before the Senate Committee on Labor and Human Resources on S. 1815, the Polygraph Protection Act of 1985. I have also enclosed answers to Senator Quayle's questions.

As I stated during my testimony before the Committee, the Justice Department is vigorously opposed to federalizing the law on private sector polygraph use. In fact, if this bill passes in the Congress, it is my opinion that the Justice Department will recommend to the President that he veto it.

I considered it a great honor to testify before your Committee on behalf of the Administration. Please accept my thanks for all your assistance in affording me that opportunity.

Sincerely,

Stephen J. Markman
Stephen J. Markman
Assistant Attorney General

Enclosure

Responses of Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, to Questions Submitted by Senator Dan Quayle Concerning S. 1815, the "Polygraph Protection Act of 1985"

1. Q. When should the federal government regulate hiring and firing?

A. As set forth in my prepared statement concerning S. 1815, whether decisionmaking on a particular issue ought to be performed at the national or state level requires a careful balancing of the values of federalism that mitigate in favor of state regulation with those values that mitigate in favor of national regulation. Among those values weighing in favor of state regulation are:

Dispersal of Power -- By apportioning and compartmentalizing power among the national and 50 state governments, the power of government generally is dispersed and thereby limited.

Accountability -- State governments, being closer to the people, are better positioned as a general matter to act in a way that is responsive and accountable to the needs and desires of their citizens.

Participation -- Because state governments are closer to the people, there is the potential for citizens to be more directly involved in setting the direction of their affairs. This ability is likely to result in a stronger sense of community and civic virtue as the people themselves are more deeply involved in defining the role of their government.

Diversity -- Ours is a large and disparate nation; the citizens of different states may well have different needs and concerns. Federalism permits a variegated system of government most responsive to this diverse array of sentiment. It does not require that public policies conform merely to a low common denominator; rather, it allows for the development of policies that more precisely respond to the felt needs of citizens within different geographical areas.

Competition -- Unlike the national government which is necessarily monopolistic in its assertion of public authority, the existence of the states introduces a sense of competition into the realm of public policy. If, ultimately, a citizen is unable to influence and affect the policies of his or her state, an available option always exists to move elsewhere. This option, however limited, enhances in a real way the responsiveness of state governments in a way unavailable to the national government.

Experimentation -- The states, by providing diverse responses to various issues which can be compared and contrasted, serve as laboratories of public policy experimentation. Such experimentation is ultimately likely to result in superior and in some instances naturally uniform policies, as states reassess their own and other states' experiences under particular regulatory approaches.

Containment -- Experimenting with varying forms of regulation on a smaller, state scale rather than on a uniform, national scale confines the harmful effects of regulatory actions that prove more costly or detrimental than expected. Thus, while the successful exercises in state regulation are likely to be emulated by other states, the unsuccessful exercises can be avoided.

Other factors, including a demonstrated need for national policy uniformity or for a single system of enforcement, mitigate in favor of action by the national government. Under this analytic approach, the national government should regulate aspects of the hiring and firing of private sector employees only when, on balance, those factors in favor of national regulation outweigh those in favor of state regulation. We have found such a need for national action, for example, when addressing various discrimination issues.

2. Q. When should the regulation of hiring and firing be left to the states?

A. Under the analytic approach detailed in my answer to your first question, decisions as to whether or not to regulate particular aspects of the hiring and firing of private sector employees should be left to states when, on balance, the factors mitigating in favor of state regulation outweigh those in favor of national regulation. In many instances, of course, the terms and conditions of private employment are best left to the market; again, however, that choice is generally best left for the states to make, and should not be imposed by the national government.

3. Q. Why should the federal government prohibit polygraphs?

A. As I stated in my testimony, it is the view of the Justice Department that the federal government should not prohibit private sector use of polygraphs. When the factors discussed in my answer to your first question are examined in the context of polygraph regulation, the balance, in our judgment, is clearly struck in favor of state not national regulation. Not only is there no need for national enforcement or uniformity with respect to private sector polygraph use, but the benefits of leaving regulation to the states are evident. Polygraph regulation is a complex issue, subject to extensive ongoing debate, in which a substantial number of reasonable responses are available to the states. Indeed, the 35 states that have regulated in this field have adopted widely varying approaches. Nineteen states and the District of Columbia regulate employers' use of the polygraph; three states regulate employers' use of other "honesty testing devices." Some of these states completely ban the use of polygraphs by private employers; others prohibit employers from requiring employees to take the tests, but allow them to be administered to employees who volunteer to take them; still others exempt certain occupations -- ranging from police and firefighters to jewelers to pharmaceutical companies -- from the ban. Six of these states additionally regulate polygraph examiners. Of those states that do not directly regulate employers' use of polygraphs, thirteen regulate polygraph examiners -- some requiring licensing, some limiting the types of questions that can be asked to employees. This diversity, with the alternatives it provides to citizens -- some of whom are vigorously opposed to polygraph use and some of whom adamantly endorse such tests -- and the ability it provides to experiment with different approaches is one of the primary reasons the Framers of our Constitution created a two-tiered system of government, with much of the regulatory authority remaining with the states.

4. Q. Isn't the real question improper use of polygraphs and not that they are all bad?

A. From the Administration's perspective the real question is who should make the decision as to whether to regulate and how to regulate private sector use of polygraphs. For us, whether or not polygraphs should be prohibited or regulated in some other fashion is not the issue. Assuming that polygraphs are abused by private employers, the states are as capable as the national government of recognizing and remedying any such problems.

5. Q. Do you favor the exemptive approach to the use of polygraphs?

A. The Department of Justice does not favor the exemptive approach to polygraph regulation embodied in H.R. 1524 or any other form of federal regulation of private sector polygraph use.

6. Q. Why should exemptions be permitted for some industries and businesses and not others?

A. As I indicated in my answer to your fifth question, the Department of Justice does not favor any federal government regulation of private sector use of polygraphs and, consequently, has not advocated that some industries and businesses be exempt while others are not. As I indicated in my written statement, it is our opinion that the exemptions found in H.R. 1524 highlight the arbitrary nature of current decisions made by the House of Representatives on which occupations to exempt. If polygraphs provide benefits to employers in the armored car industry, it is difficult, if not impossible, to understand why banks (where 84% of losses are attributed to employee theft) or the legal gaming industry (where large sums of money change hands and policing of employees is difficult) are not entitled to the same benefits. Likewise, if polygraphs are useful to protect employers and the public from prospective employees seeking sensitive positions involving the distribution or sale of controlled substances, they would seem to be equally useful for screening prospective employees for other sensitive positions, such as airport security personnel and truck drivers transporting munitions and other hazardous materials. From the Administration's perspective, these arbitrary exemptions reaffirm that polygraph regulation is a complex and emotional issue which poses a number of questions with no definitive answers. It is an issue which requires careful balancing of the interests of consumers, employees, and employers. Possible responses range from relying on the free market, to licensing polygraph examiners, to banning completely the use of polygraphs. While all sorts of variations on these approaches are possible, which precise approach is best for any given state should be left to the citizens of that state.

7. Q. If polygraphs are "all bad" why should the Department of Defense be permitted to use them? Why should intelligence and counterintelligence agencies of the federal government be permitted to use polygraphs if they are unreliable?

A. The validity of polygraphs has been widely debated during the last two decades and the scientific community itself is divided on the validity issue. Nonetheless, as I indicated in my written statement, wide private sector use of the tests provides evidence that polygraph tests are sufficiently valid to be useful under some circumstances, as does S. 1815's exemption of all government employees. There can be no question that polygraph use is of vital importance to protect our national security. Certainly if the machines are reliable indicators of truth or falsity in the public sector, they are equally as reliable in the private sector.

8. Q. If polygraphs are so unreliable, why should day care centers and nursing homes be permitted to use them?

A. See my answer to your sixth question.

9. Q. The states currently regulate whether employees can be fired or not hired for: refusing to work with a hazardous substance; refusing to be sterilized; for being a volunteer fireman; filing a workman's compensation claim; being a whistleblower; wage garnishment or assignment; receiving a summons to do jury duty; having AIDS; refusing to contribute to a group health policy; refusing a drug or alcohol test. Comment on each of these categories and whether they should be regulated by the federal government.

A. Under the analytic framework discussed in my answer to your first question, unless a strong national interest could be demonstrated, I believe that any regulation of each of these categories should remain with the states. Some of these categories, like being a volunteer fireman or receiving a summons to do state court jury duty, involve services provided by state or local governments, where national government regulation would interfere with state and local government sovereignty. The others are categories where there is a strong need for all of the benefits that we have outlined as weighing in favor of state (as opposed to national) regulation, i.e., dispersal of power, accountability, participation, diversity, competition, experimentation, and containment.

The CHAIRMAN. Let me just ask you a couple of questions, though.

As I understand, the Department of Justice asserts that important principles of federalism mandate that we do not intervene on matters that have traditionally been held to be the responsibilities of the various respective States, and on which there is no overriding need for a national public policy uniformity.

Yet I think you would have to recognize that in the field of labor law, it is hard to find an issue that has been totally left to State regulation—for instance, Landrum-Griffin, the National Labor Relations Act, the Equal Pay Act, the 1964 Civil Rights Act, the Age Discrimination in Employment Act, the Occupational Safety and Health Act. These are just to mention a few of the numerous Federal statutes that really have been regulating private sector employment practices.

Actually, the only issue that has been left to State regulation that I think is a principal main issue is the problem of remedying labor violence.

Now, as I understand it, the Department of Justice is supporting a bill by Senator Grassley to correct this oversight by amending the Hobbs Act so that we can have Federal preemption in that area—which seems to me somewhat inconsistent with what you are saying here today, although I agree with that thrust; I think we ought to get rid of labor violence.

Now, why should this committee believe it is appropriate for the Federal Government to regulate employment practices to the detailed degree that it has been regulating them, that it does under Federal labor laws, but at the same time, it is inappropriate for the Congress to address the real problem of polygraph abuse in this country?

Mr. MARKMAN. Yes, Senator, I agree with your observation that probably more than in many other areas of the law, the area of labor law has indeed been federalized. But I would note that even in the area of labor law, there is disparate treatment of various legal issues. In some areas, indeed, there has been federalization, and you have noted many of those areas. In other areas, there has not been federalization; there has been State regulation—workmen's compensation, for example. In still other areas, probably in the majority of areas, these decisions have been left to the collective bargaining process, the decisionmaking process joined by the employer and the union. In various other areas of the law, there has been absolutely no regulation whatsoever—for example, the parameters of the interview process. So long as an employer does not discriminate on account of certain things prohibited by our civil rights laws, there is almost no Federal regulation—in fact, none that I can think of in the details of the interview process.

The CHAIRMAN. Well, in the area of testing, there is considerable Federal regulation under title VII and other employment laws; there has been a lot of Federal preemption, certainly in the area of testing.

Mr. MARKMAN. Yes, sir, but as I indicated, apart from civil rights laws, I do not believe there is any regulation in that area that relates to the relationship between the employer and employee.

The CHAIRMAN. Well, of course, you have heard two Congressmen say that these polygraph examinations, they feel, are violative of civil rights in this country.

Mr. MARKMAN. Well, I think one matter that has to be cleared up, Senator, is the idea of what a civil right is. A civil right is generally something that concerns the relationship between an individual and the State. It does not relate generally to private relationships. And this idea of treating every relationship between private individuals as demanding some kind of public solution is, I think, an incorrect understanding of what a civil right is.

The CHAIRMAN. All right. You also contend, Mr. Markman, that there is no evidence of an overriding need for a national policy of uniformity; that the benefits of State regulation are evident here. The committee, I just have to point out, has received numerous examples of polygraph abuse in the States and in the private sector—of persons being fired in one State for not taking the test, and being protected in another State where they have refused to take the test, and of employees being coerced into signing confessions. There are a lot of abuses that we have been able to find.

Take, for example, our next witness, Mary Braxton. She was so abused by a polygraph examiner in the State of Virginia—which is a regulated State—that a State court of law awarded her $21,000 in damages. But that has done her very little good, because she has never seen a cent of that award because the polygraph examiner has fled the State.

Now, how has State regulation benefited people like Mary Braxton?

Mr. MARKMAN. Senator, again I agree with you. I have read much of the evidence that has been presented to your committee, and I have no trouble at all with the proposition that there have been abuses and misuses of polygraphs. Indeed, I would go beyond that and recognize the fact that there may be inherent difficulties in the technology of polygraphs themselves, whether or not they are used in an abusive manner.

I simply do not understand what the argument is in favor of the proposition that we need to establish a single, uniform, federalized policy in this area, given the fact that there are at least 35 States that have attempted in various ways, in varying details, to regulate these problems on their own.

The CHAIRMAN. Thank you.

Senator Kennedy?

Senator KENNEDY. Senator Hatch pointed out the questions on jurisdiction and the reluctance that you apparently have in supporting this legislation because of the extension of Federal jurisdiction. And yet we have seen where the administration really did not have any difficulty when we were talking about extending the jurisdiction in the Hobbs Act, or, for example, product liability.

Let me just ask, in your testimony you were talking about the Justice Department having opposed the use of polygraph examination results in criminal trials as evidence of guilt or innocence for several reasons—first, the defendant could seek out a friendly examiner and take the test and use the favorable result.

Well, why isn't it possible for an employer to get a friendly examiner, so to speak, or identify a troublesome employee and use those same results?

The point I am getting at—evidently, in your testimony, you recognize what are friendly examiners. That evidently would mean that they could get the kind of result they wanted to get. And that can either be abused, misused, I imagine, for any one of a number of reasons. Once you acknowledge that, if that is the case, doesn't that just undermine your whole other argument with regard to reliability?

Mr. **Markman**. Senator, I would like to respond to your questions individually, if that would be acceptable? First of all, the Hobbs Act issue, which Senator Hatch also mentioned, seems to me to be a totally different situation. In the area of the Hobbs Act Congress has already made the judgment that extortion in the context of violent actions ought to be treated under certain circumstances as Federal offenses. The current Hobbs Act controversy is whether or not the Supreme Court in the *Enmans* case correctly interpreted that statute when it held that labor unions were exempt from the provisions of the extortion law, so long as the violence occurred in what it called the collective-bargaining context.

Now, whatever the decision reached by Congress on that issue, it strikes me that it is a different kind of question. The fact is, Congress has already made the judgment that this is an area that ought to be federalized. The question is whether or not the Court was right to exclude from that federalization one area covered, that is, labor unions in collective bargaining. I do not see that as being so much of a federalism question as I do one of statutory interpretation—a question of whether or not the courts acted properly in carving out that exception.

Second, I am glad you raised the question of consumer product liability, because indeed, I think it only honest to acknowledge——

Senator **Kennedy**. I am not sure I am.

Mr. **Markman**. I think within the administration, I do not think——

Senator **Kennedy**. I hope the chairman will give me a couple of extra minutes to get an answer to the last part.

Mr. **Markman**. I am sorry. I do not think it is any deep secret that there has been a debate within the administration on this bill, as well as on other bills, as to whether or not it did violate traditional federalism principles.

What I have attempted to set forth in the statement—I did not quite have a chance to get that far—were seven or eight principles that we try to go through in determining whether or not it is appropriate for the Federal Government to act within a specific area.

Now, reasonable people are going to differ in their conclusions after going through these factors. The basic point of my statement was simply that these are the kinds of factors that the executive and legislative branches ought to be thinking about in the decisionmaking processes.

In answer to your question about Justice Department fears as to "friendly examiners" and use of polygraph evidence during a criminal trial, I hope that while we really take no position on how accurate polygraphs are, I think it important to acknowledge that there are very real differences in using polygraphs in a private sector employment context, where it is in the best interest of those administering the test to ensure accurate results; while there is every incentive to ensure accurate results in the employment context, in the context of a criminal trial, the accused has every incentive to find a polygraph examiner who is less interested in ensuring an accurate response and more in vindicating the accused.

Certainly, as with all tests requiring interpretation, an accurate result depends on administering the test and interpreting the results in a competent and unbiased manner. In other words, the ability and integrity of the examiner is crucial to securing a valid result. The question is simply one of incentives. The employer has every incentive to ensure an accurate result; the criminal defendant has as his incentive the jury's coming to the conclusion that he is stating his case in an honest and accurate manner.

The CHAIRMAN. Well, thank you, Mr. Markman.

Senator Kerry—excuse me. We need to get you up here a little closer to us, because I keep missing you over there.

Go ahead.

Senator KERRY. I am sort of intrigued by the last part of your answer to Senator Kennedy there, about assuming the employer would want to get an accurate result. I mean, you are making a very large assumption there.

Are you not aware of many instances where employers may not want an accurate result? The letter you wrote to Speaker O'Neill said, "First, the defendant could seek out friendly examiners."

So you clearly accept the principle that if someone wants to affect the outcome, you can affect the outcome; correct? You accept that principle? I mean, you have asserted that principle.

Mr. MARKMAN. Yes, sir, I accept the principle that a dishonest examiner can distort the results and distort the interpretation of the results.

Senator KERRY. Well, "dishonest" may even be a strong word. You used the word "friendly". "Friendly" does not necessarily mean "dishonest". You can interpret these things different ways.

Mr. MARKMAN. Yes, sir.

Senator KERRY. You do not have to be dishonest to see different waves and have a sense of how you want to interpret it, isn't that correct?

Mr. MARKMAN. Yes, sir.

Senator KERRY. And it is a subjective determination, is it not?

Mr. MARKMAN. I am not an expert on polygraphs, but it is my understanding that there certainly is an area of discretion for polygraph examiners.

Senator KERRY. Well, let me tell you that it is a subjective examination. The polygraph examiner makes his determinations. There is no outright, "This is true, this is not true," that comes through. It is a pattern that you look for, and it is certain variations in that pattern.

But assuming that is true, let me get to the heart of this. If you had employers who for whatever reason—and you and I do not need to decide what the reasons are here—but if for whatever reason they wanted to also find a, quote, "friendly examiner," who could prejudice the outcome for whatever purposes they wanted, that could happen, could it not?

Mr. MARKMAN. Yes, sir, it could.

Senator KERRY. So if one has a different assumption than you have, one could say you need to protect against that ability to come up with the predeterminated result, don't you?

Mr. MARKMAN. Again, Senator, I guess I just have a question in my mind as to what would be the incentive for an employer to seek a predetermined result. If, indeed, there was an individual applying for a job that the employer wanted to reject for some reason, I do not see why he would want to go through the time, trouble, and expense of a polygraph examination, as opposed to just sitting down across the desk from that individual and deciding he did not like that individual's hygiene, he did not like the color of his eyes, or he did not like some other characteristic.

Senator KERRY. Well, in certain kinds of hiring situations, it is a good way to provide an excuse for avoiding timetables, quotas, and other things which the administration does not like, or which certain employers do not like.

Mr. MARKMAN. Well, Senator, it is my understanding that unlawful discrimination would be fully covered by title VII. To the extent polygraph examinations were used as a pretext for discriminating against individuals protected by that act, that conduct would be well within the ambit of title VII as it is.

Senator KERRY. Yes, but if you have a friendly examiner who says this person is a risk with respect to possible whatever abuse, you have an enormous hurdle to get over to try to satisfy any requirements. That is the point.

Let me come back a little bit from that. The point is you could have that, and I think there is evidence, and the panel will hear evidence, regarding individuals who have reason to question the "why" of their firing. But I just think it is important that you are willing to acknowledge that.

Let me ask you this, Mr. Markman. Would you describe to the committee the difference between a polygraph test procedure utilized by the FBI and security agencies and the test procedure that is used by the typical private sector employer?

Mr. MARKMAN. I would not be able to tell you the differences between those, no.

Senator KERRY. You cannot tell us that?

Mr. MARKMAN. No, I certainly cannot.

Senator KERRY. Well, can you tell us the differences in examiner qualifications?

Mr. MARKMAN. No, sir. I hope I have made clear in my statement that I am not an expert on polygraphs or polygraph examinations, and we in the Justice Department neither take a position for or against private sector polygraphs or polygraph examiners, or any particular kind of rules or regulations. We simply do not see where the case lies for making uniform whatever rules and regulations it is decided are appropriate in this area.

Senator KERRY. Well, it puzzles me even a little bit more then—and maybe you can clear this up—because both S. 1815 and H. 1524 invest authority in the Secretary of Labor, and not the Attorney General.

Mr. MARKMAN. Yes, sir.

Senator KERRY. So I wonder why you are here opposing this and not a representative from Secretary Brock. Maybe you can shed some light on that.

Mr. MARKMAN. Well, I think that, as in the case of most other legislative initiatives, the interests of the Federal Government are crosscutting. Obviously, the Labor Department has got a real interest in this bill, given the regulatory authority it would invest in the Labor Department. But in this administration, a lot of responsibility for constitutional interpretations and constitutional matters has been placed in the Justice Department, and our analysis of this bill basically stems from the point of view of federalism policy and whether or not this is the kind of issue that ought to be taken from the States and moved to the Federal Government.

That is really the basis for our position.

Senator KERRY. So the bottom line, from your perspective, is federalism.

Mr. MARKMAN. Absolutely.

Senator KERRY. OK. With respect to that, do you acknowledge that there are situations now where private employers are crossing State lines in order to seek polygraph examinations in States where it is not prohibited when their base of operations is in a State where it is prohibited?

Mr. MARKMAN. Well, Senator, I have read certain attempts to justify this bill on that basis, and I would say that such a justification strikes me as probably the most compelling argument for the Federal Government doing something.

I would respond, however, in two respects. No. 1, apart from anecdotal evidence, I have not seen any evidence whatsoever that crossing State lines in fact is a problem; that employers, for example, in Detroit, are crossing the State line and do their hiring in Toledo. That just strikes me as something not likely to occur on a very systematic basis.

But secondly, to the extent that it did occur on some kind of systematic basis, I would indeed agree with what I think you are suggesting, that there might be a greater Federal role there, and that our federalism problems would be considerably diminished.

Senator KERRY. So if there is some showing to that effect, the administration might be willing to shift its position?

Mr. MARKMAN. Well, we would not shift our position on S. 1815, but we might not object to a more focused, narrow bill, dealing with this question of employers crossing State boundaries.

Senator KERRY. One final question. I was intrigued by your definition of civil rights—which I do not disagree with in terms of a sort of generic definition of civil rights. In all of the things that Senator Hatch listed, from OSHA down the line, there has been a clear recognition of other kinds of rights that the Federal Government seeks to protect.

Do you not recognize in those rights that are being asserted here by workers any of those similar kinds of rights that are in need of protection?

Mr. MARKMAN. Senator, I am not sure if I was clear in making my point, but my point was in general response to the suggestion that the absence of the regulations imposed by this legislation has all sorts of constitutional implications, and that the fifth amendment and the first amendment and the ninth amendment, and the other privacy rights of individuals may be implicated by the lack of such Federal regulation at this time. I would disagree with that.

It may well be desirable policy that an individual be protected against certain kinds of polygraph examinations. I just think it diminishes the debate to suggest that there are some constitutional questions there. Obviously, the fifth amendment applies in the criminal context, but more importantly, it applies in the context of the relationship between the citizen and the State, not the relationship between two citizens.

But I would agree with you that there are obviously a great many rights that are not constitutional rights, and it is a judgment of this committee and it is a judgment of the State legislatures as far as whether or not they ought to be protected in some meaningful fashion.

Again, it is simply the thrust of our testimony that there is an absence of evidence that any necessary regulation of polygraph use in the private sector is not being performed adequately by the 50 States or that it is incapable of being performed adequately by the 50 States.

Senator KERRY. Mr. Chairman, I thank you for the time to question. I have to go to another hearing, but I would just like to say that Massachusetts was the first State in the country to ban the use of the polygraph in private employment practices back in 1959. I think it is clear now, we have, I think, about 3 percent unemployment, some of the best high-technology companies in the country, many, many defense contracting companies—AFGO, EG&G—they are working on many secret programs. The State has been able to flourish, and I might say, without complaint—without complaint—regarding this issue and its ability to be able to hire and to protect people's rights.

So I am a supporter of this. I am also a former prosecutor, and I have used the lie detector on many an occasion. I happen to believe it can be a useful tool under appropriate circumstances. But I think the great distinction between the private sector and the public sector is that in the public sector, at least in the justice system, it is used where if the State errs, it is to the detriment of the State almost always, and not the individual; and where it is used to lift a cloud from somebody's life rather than to put one on top of it. I think in the private sector, the difference is that it is used and has been abusively, in a way that when there is an error, it is an error against a citizen of this country. I think that is the great distinction between those, and that is one of the reasons why I support it.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator. I appreciate your comments.

Mr. Markman, I want to thank you for appearing today. I can take great pride in stating that your legal skills, that were so refined up here, have continued on. We just hope next time you come up, you will be able to testify in favor of one of our bills rather than against it.

Mr. **Markman**. Well, I hope you know this testimony was undertaken with the greatest trepidation. [Laughter.]

The **Chairman**. We are glad to have you here, Steve. Thanks so much.

Mr. **Markman**. Thank you.

The **Chairman**. Our next witness is Dr. David C. Raskin, a professor of psychology at the University of Utah. Dr. Raskin has been extensively involved in the study of polygraph testing and is a consultant with the U.S. Government.

So Dr. Raskin, we welcome you to the committee. I understand you have a short statement to make, and then maybe a demonstration.

## STATEMENT OF DAVID C. RASKIN, PH.D., PROFESSOR OF PSYCHOLOGY, UNIVERSITY OF UTAH, SALT LAKE CITY, UT

Dr. **Raskin**. Thank you very much, Senator Hatch and Senator Kennedy both, for this opportunity to speak on behalf of this very important bill.

I have submitted a lengthy statement for the record, so I will just try to summarize the high points of what I have to say.

To begin with, I might add also that I have served as an expert in many cases of polygraph abuse around the Nation, and it is a very serious problem in spite of what some of the proponents of polygraphs might say. I am a licensed polygraph examiner and do work in the criminal area.

One thing I would like to point out very clearly is that there is a substantial difference between its use in criminal investigation and in national security applications as compared to commercial screening applications. The types of tests that are used are quite different; the training and competence of the examiners is quite different; the protections for the individual are different; the accuracy rates of the tests are different; the amount of time devoted to the types of tests in the two situations are substantially different, and in general, there are so many differences that it leads me to this conclusion that the bill to make the polygraph illegal in the commercial sector on a nationwide basis is one which should be supported, because it is so abusive and substantially different from the uses in national security applications and in criminal investigation.

There are certain things that I would like to point out, also, and that is that when the polygraph tests make errors, they tend to be predominantly errors of identifying truthful individuals as being deceptive. This is consistent no matter what applications of the polygraph are used. So that we have a problem of labeling people as being deceptive more frequently when they are telling the truth than making the reverse kind of error.

Second, there is a major difference in terms of the purposes of these tests in law enforcement and in many national security applications, as compared to commercial. In law enforcement, there is an attempt to assess whether or not an individual was involved in something which has already happened. This is a much easier thing to assess. When you look at its use in screening employees in the commercial sector, the basic purpose of that is to assess their suitability for employment and to try to predict their future behavior on the job. This is an extremely difficult thing to do, and particularly difficult using polygraph tests.

Third, even though the polygraph may be highly accurate—and let us grant the proponents of polygraph use in the commercial sector an accuracy rate which I do not think is deserved, which is 80 or 85 percent accuracy—even if you grant that, almost half the people who take that test will fail erroneously when they are telling the truth if one out of five people are in fact liars.

Now, this seems counter intuitive at first, because how can you say that a test with that kind of accuracy will produce that kind of error. But it has to do with the proportion of people in the sample that are in fact lying. If one out of five people is lying with a test that is 85 percent accurate, almost half of the people who fail the test are in fact telling the truth.

When you apply that to the commercial sector, for every 1 million people who take a polygraph test, approximately 160,000 will be wrongly identified as lying. Now, that is a very substantial problem, and the calculations are very simple to do, and I think they are incontrovertible.

Furthermore, there is no scientific evidence that polygraph testing, when used in the commercial sector for screening, has any validity. So even if we grant them high accuracy, there are problems, but there is no evidence to support that kind of accuracy. There is quite a difference when the Government has been using these tests for national security purposes, where there are specifically identified issues, and where there are many protections for the individual in terms of follow-up investigations and the use of these tests as only one piece of evidence. Furthermore, the training and competence of the examiner to do those tests is substantially greater than those who use these in private industry. In private industry, the examiners tend to be poorly trained; maybe they have attended a 6- or 7-week school; they generally have no specialized education; their ethics are questionable, very frequently, and they often conduct these tests in 15 or 20 minutes under undesirable circumstances, as opposed to the 2 to 3 hours which is typical of a specific criminal investigation test, and in national security screening, it may take as much as a day or two with particularly difficult problems to resolve the issue using the polygraph.

Furthermore, the State laws have not proven to be effective in regulating these problems. There are States that have stringent regulations. There are ways that employers get around these things. They can pretend that they have denied employment for reasons other than the polygraph under many of these laws, when in fact the polygraph is the main issue. They extract confessions from people which sometimes are trivial and cause these people extreme damage in their personal lives.

So I think that given all of these issues and problems and the differences between what I would consider legitimate uses and the uses in the commercial sector, I think that it is very clear that they should be banned in general in the commercial sector, and I personally do not support most of the exemptions which have been offered.

[The prepared statement Dr. Raskin and his response to questions by Senator Quayle follow:].

# STATEMENT OF DAVID C. RASKIN, PH.D.

PROFESSOR OF PSYCHOLOGY, UNIVERSITY OF UTAH

AT HEARINGS ON S. 1815 THE POLYGRAPH PROTECTION ACT OF 1985

BEFORE THE LABOR AND HUMAN RESOURCES COMMITTEE, UNITED STATES SENATE

23 APRIL 1986

I wish to begin by expressing my appreciation to Senator Hatch, Senator Kennedy, and the other members of the Committee on Labor and Human Resources for this opportunity to present information regarding the issues which are addressed by S. 1815 "The Polygraph Protection Act of 1985." It is a timely and significant bill which addresses practices which have a substantial and direct impact on the lives of millions of Americans.

My name is David C. Raskin, and I am a Professor of Psychology at the University of Utah in Salt Lake City, Utah. I have specialized in human psychophysiology for 27 years, and I have been intensively engaged in scientific research on polygraph techniques for the past 16 years. I am a licensed polygraph examiner and have been involved in the application of those techniques in criminal investigation and civil litigation for 14 years. I regularly teach courses and seminars on polygraph techniques and applications at the University of Utah and to government personnel in the United States, Canada, and Israel, as well as local law enforcement and private polygraph examiners around the country. I have had numerous federal grants and contracts for polygraph research and evaluations of government programs and have frequently provided training and consultations to federal and state agencies regarding polygraph programs, methods, and particular investigations. I am quite familiar with all of the uses of polygraph techniques for law enforcement purposes and commercial applications and have served an expert witness in many cases involving polygraph evidence in criminal and civil litigation as well as lawsuits involving abuses of polygraph techniques. I have been active in scientific and professional organizations, and I participated extensively in the development of the policy on polygraph tests adopted by the American Psychological Association on 1 February 1986. That policy raises many important questions about uses of polygraphs for employment screening and other applications.

## General Considerations

The polygraph technique was originally developed as an aid to criminal investigation within the law enforcement community, and its value in that context has been firmly established over several decades of use. Virtually all major federal and local law enforcement agencies rely on polygraph methods which have produced substantial benefits by clearing innocent suspects and identifying guilty persons. Also, federal departments and agencies with intelligence responsibilities and programs involving access to classified information have increasingly relied on polygraph techniques as an important tool in protecting the national security. Those applications have grown substantially in recent years, and the existing scientific literature provides general support for many of them. However, some of the most frequent applications have been questioned on scientific, professional, social, and ethical grounds. Those problems are particularly salient in the commercial employment applications of polygraph techniques to which S. 1815 is addressed.

Polygraph techniques for detecting deception and verifying truthfulness measure the physiological reactions manifested by a subject in response to questions asked by the examiner. Polygraph instruments typically measure changes in blood pressure, respiration, and sweating on the palms of the hands (the galvanic skin response), all of which are quite sensitive to psychological states such as attempts to deceive. However, the basic problem faced by all polygraph techniques is the current inability to identify a specific pattern of physiological reactions which is unique to deception. Since many events and psychological states such as surprise, anxiety, fear, anger, uncertainty, or resentment may produce reactions in those physiological systems; special interview techniques, question structures, and analytic methods are necessary to differentiate physiological reactions caused by deception from those caused by other factors. Those problems demand a high degree of psychological and psychophysiological sophistication on the part of the examiner, as well as appropriate purposes and circumstances for the test.

Some people claim that analysis of the voice can be used to assess credibility, and devices such as the psychological stress evaluator (PSE) and voice stress analyzers are sold and used as lie detectors. Although a great deal of scientific literature indicates that stress produces certain changes in physical characteristics of the voice, use of those changes requires sophisticated spectral analyses of the speech. The instruments commercially sold for voice lie detection are not capable of the required analyses of the voice, and all of the available scientific evidence indicates that they are worthless as lie detectors. Several states have totally banned them, including Virginia where the PSE had been manufactured until they were banned. Such devices should not be used for detection of deception.

There are fundamental differences between applications of polygraph techniques in criminal investigation and national security and the ways in which they are used by employers in the commercial sector. Those differences are manifested in the types of techniques which are used, the purposes and contexts of the examinations, the training and competence of the examiners who conduct the tests, the amount of time devoted to the conduct and interpretation of the tests, the justifications for their use, the uses which are made of the results, the scientific evidence with regard to their accuracy, and the options and protections available to those who are requested to submit to such examinations. A thorough and objective examination of those differences makes it clear that adoption of S. 1815 is the best available solution to the current problems and abuses associated with the uses of polygraphs by private employers.

## Types of Polygraph Techniques

Polygraph techniques differ in terms of the purposes for which they are designed, their question structures, their methods of interpretation, and the scientific evidence regarding their accuracy. The original polygraph method is the relevant-irrelevant test. It consists of a series of questions which contains relevant questions about the subject matter being tested (e.g., "Did you steal the money from the safe?") and neutral questions (e.g., "Is your name Mary?"). If the reactions are stronger to the relevant than to the neutral questions, the subject is diagnosed as deceptive. On the other hand, a lack of differential reactions to the two types of questions is indicative of truthfulness.

Although the relevant-irrelevant test is the technique most widely used in employment screening, it suffers from many problems. First, there is no systematic and reliable method for interpreting the outcome of a relevant-irrelevant test. Second, since it is obvious to any subject that the relevant questions are the only important questions in the test, it would be expected that many innocent subjects would react more strongly to them and be erroneously diagnosed as deceptive (**false positive error**). Third, the relevant-irrelevant test incorporates no protection against the use of drugs or other methods for lowering physiological reactivity in order to beat the test (**false negative error**). Fourth, individual differences in physiological reactivity cannot be taken into account in such a test. Fifth, the methods for adminstering the test are not standardized. Thus, it is not surprising that the scientific evidence indicates that the relevant-irrelevant test has a low level of accuracy, probably on the order of 70%. In spite of those problems and its low accuracy, the relevant-irrelevant test remains the method of choice in many programs for screening of prospective employees. Even some government agencies, such as the National Security Agency and the Federal Bureau of Investigation, make the serious mistake of relying on it for many purposes.

The control question technique is the test most generally used in criminal investigations and other situations involving past events, such as theft from an employer or civil litigation. It incorporates questions specially designed to overcome many of the problems inherent in the relevant-irrelevant test. During an extensive and complicated pretest interview which usually lasts at least an hour, the relevant and control questions are reviewed with the subject prior to their presentation during the test phase. The control questions are designed to cause an innocent person more concern than the relevant questions, and the innocent person is expected to show stronger reactions to them. In the theft example, a control question might be "During the first 23 years of your life, did you ever take something which did not belong to you?" That question is worded and explained by the examiner in such a way that the subject will answer "No" to that question. Even though innocent subjects are certain of the truthfulness of their answers to the relevant questions, they will be concerned about failing the test because of deception or uncertainty about being truthful in answering "No" to the control questions on the test. The control questions are deliberately vague, cover a long period in the subject's prior life, and include acts which almost everyone has committed but are embarrassed to admit in the context of a psychologically proper polygraph examination. On the other hand, guilty subjects are more concerned about failing the test because they know that they are being deceptive to the relevant questions.

The outcome of a control question test is evaluated by a numerical scoring system which is highly reliable. If the reactions are stronger to the relevant questions, the subject is diagnosed as deceptive. However, stronger reactions to the control as compared to the relevant questions are indicative of truthfulness to the relevant questions. The control question procedure also takes into account the individual reactivity of the subject. Any factor which produces a generally high or generally low level of reactivity will result in little difference between the reactions to the relevant and control questions, and the outcome will be inconclusive instead of wrong. The control question test is administered according to a standard format, and the examination usually takes at least two hours.

## Purposes and Contexts of Examinations

Polygraph techniques are used for different purposes in a variety of contexts. In most criminal investigations an incident has already occurred, and such methods are designed to assess the credibility of suspects who deny knowledge or involvement in criminal activity and informants who offer information about the incident, usually for some personal gain. Thus, **applications in criminal investigation attempt to determine truth or deception with regard to a specific event which has already occurred.** Furthermore, every person has a constitutional right to refuse to take such a test without prejudice. Polygraph techniques were originally developed for such situations, and the scientific evidence indicates that the control question test may attain accuracies in the range of 85%-95% when assessing credibility regarding a past event.

Accuracy of the control question test has been assessed in laboratory mock-crime experiments and with actual criminal cases. The results of many of those studies are shown in Table 1, and they indicate accuracies of approximately 95% in the laboratory and approximately 85% in field studies.

Table 1

ACCURACY OF CONTROL QUESTION POLYGRAPH TESTS

| | LABORATORY MOCK-CRIME EXPERIMENTS | | | | | |
|---|---|---|---|---|---|---|
| | RASKIN & HARE (1978) | PODLESNY & RASKIN (1978) | ROVNER, RASKIN & KIRCHER (1979) | DAWSON (1980) | KIRCHER & RASKIN (1982) | COMBINED RESULTS |
| ALL SUBJECTS | N=48 | N=20 | N=48 | N=24 | N=100 | N=240 |
| CORRECT | 88 | 85 | 88 | 88 | 87 | 87 |
| WRONG | 4 | 5 | 4 | 8 | 5 | 5 |
| INCONCLUSIVE | 8 | 10 | 8 | 4 | 8 | 8 |
| DECISIONS CORRECT | 96 | 94 | 96 | 91 | 95 | 95 |
| GUILTY SUBJECTS | N=24 | N=10 | N=24 | N=12 | N=50 | N=120 |
| CORRECT | 88 | 80 | 88 | 100 | 88 | 88 |
| WRONG | 0 | 10 | 0 | 0 | 4 | 3 |
| INCONCLUSIVE | 12 | 10 | 12 | 0 | 8 | 9 |
| DECISIONS CORRECT | 100 | 89 | 100 | 100 | 96 | 97 |
| INNOCENT SUBJECTS | N=24 | N=10 | N=24 | N=12 | N=50 | N=120 |
| CORRECT | 88 | 90 | 88 | 75 | 86 | 86 |
| WRONG | 8 | 0 | 8 | 17 | 6 | 7 |
| INCONCLUSIVE | 4 | 10 | 4 | 8 | 8 | 7 |
| DECISIONS CORRECT | 91 | 100 | 91 | 82 | 93 | 92 |

10 FIELD STUDIES (OTA REPORT)

| | GROUND TRUTH (CRITERION) | |
|---|---|---|
| EXAMINER DIAGNOSIS | GUILTY | INNOCENT |
| CORRECT | 86.4 | 76.2 |
| WRONG | 10.2 | 19.0 |
| INCONCLUSIVE | 3.4 | 4.8 |
| DECISIONS CORRECT | 89.4 | 80.0 |

Two important aspects of those results should be emphasized. First, higher accuracy is obtained in laboratory studies than in field studies. That is probably due to several factors, including better control in the laboratory studies, more standardized techniques, trained psychologists conducting and interpreting the tests, better instrumentation, and better methods for evaluating the outcomes. Furthermore, the field studies selected by OTA (Office of Technology Assessment) suffered from many of the methodological inadequacies which are characteristic of that type of research. However, an average accuracy of 85% is probably a reasonable estimate of the overall level of performance of the typical professional polygraph examiner. Certainly, highly trained examiners such as those of the U.S. Secret Service are performing at a much higher level than average, but many field examiners such as those in commercial applications are undoubtedly performing at a level much lower than that average.

Another noteworthy aspect of those results is that the errors tend to be false positive as opposed to false negative errors. Whether we consider the laboratory or field results, many more errors are made by incorrectly labeling innocent subjects as deceptive than by labeling guilty subjects as truthful. Those findings are consistent throughout the scientific literature and emphasize the need for caution in the interpretation of deceptive outcomes on polygraph tests, especially when the results of such tests are used in the employment context where individuals may be required to take the tests and their employability may be determined entirely by the findings of the polygraph examiner.

The problem of false positive errors is magnified in those situations where the incidence of deception is relatively low. That is known as the **problem of baserate**. When the proportion of examinees practicing deception differs from 50%, the confidence in the outcome of a test is not the same as the average accuracy of the test. When most of the individuals tested are actually being truthful, many of the deceptive outcomes are errors in labeling truthful people as deceptive. Therefore, the confidence in a deceptive test outcome is much lower than we might expect with a highly accurate test. That is illustrated in Table 2 which shows the confidence in truthful and deceptive test outcomes for different baserates of guilt, using estimates of accuracy derived from laboratory studies and from field studies.

An inspection of the results shown in Table 2 reveals that as we decrease the proportion of guilty people among those who are tested, confidence in truthful outcomes rises and confidence in deceptive outcomes falls. For example, when half of the subjects are in fact guilty, confidence in a deceptive outcome is 92% if we use accuracy obtained in laboratory studies and 82% if we estimate accuracy from field studies. However, when only 20% of the subjects are in fact guilty, confidence in deceptive outcomes is only 75% when accuracy is estimated from the laboratory results and only 53% with field accuracy estimates. Therefore, in a field situation where 20% of the people tested are actually lying and the overall accuracy of the test may be as high as 85%, almost half of the people who fail the test are in fact innocent! If 1 million employees and prospective employees are tested annually under those conditions, 160,000 will be falsely accused of being deceptive. That problem prompted the American Psychological Association to state that "**There is the possibility of great damage to the innocent persons who must inevitably be labeled as deceptors in situations where the base rate of deception is low; an unacceptable number of false positives would occur even should the validity of the testing procedures be quite high.**"

### Table 2

### PERCENT CONFIDENCE IN TEST RESULTS WITH DIFFERENT ESTIMATES OF ACCURACY OF POLYGRAPH TESTS AND BASERATES OF GUILT

| | ACCURACY ESTIMATED FROM | | | |
|---|---|---|---|---|
| | LABORATORY STUDIES 97% GUILTY, 92% INNOCENT | | FIELD STUDIES (OTA) 89% GUILTY, 80% INNOCENT | |
| | TEST RESULT | | TEST RESULT | |
| BASERATE OF GUILT | DECEPTIVE | TRUTHFUL | DECEPTIVE | TRUTHFUL |
| 90% | 99 | 77 | 98 | 45 |
| 80% | 98 | 88 | 95 | 65 |
| 70% | 97 | 93 | 91 | 76 |
| 60% | 95 | 95 | 87 | 83 |
| 50% | 92 | 97 | 82 | 88 |
| 40% | 89 | 98 | 75 | 92 |
| 30% | 84 | 99 | 66 | 94 |
| 20% | 75 | 99 | 53 | 97 |
| 10% | 57 | 99 | 33 | 98 |
| 1% | 11 | 100 | 04 | 100 |

The problems of accuracy and baserates are exacerbated when polygraph tests are used in a commercial setting. In criminal investigations, examiner competence and accuracy of the tests are relatively high, the baserates of guilt among those tested tend to be around 50%, and the test is designed to assess credibility concerning a past event. However, **polygraphs are most often administered for private employers by poorly trained examiners to screen prospective employees in order to assess their suitability for employment by attempting to predict future behavior on the job.** That is not only an extremely difficult task for any psychological technique or test, but polygraph techniques are poorly suited to that purpose. Furthermore, many applications of polygraph tests in the commercial sector occur in situations where the baserate of deception with regard to job-relevant issues is relatively low, frequently lower than the 20% used in the illustration above. Under those circumstances, the confidence which can be placed in a deceptive test outcome may drop considerably below 50%.

Although there are dozens of scientific studies which show a high degree of accuracy of polygraph tests for assessment of credibility with regard to past events, **there is not a single scientific study which demonstrates any reasonable degree of accuracy for general employment screening tests.** However, the coercive and misleading context in which they are typically used by prospective employers often elicits admissions by the subject which are often used as a reason to deny employment to that individual. Therefore, those who make the greatest efforts to be forthright by admitting minor transgressions or personal weaknesses are more likely to be disqualified than those who have committed seriously dishonest or illegal acts or other disqualifying behaviors and who steadfastly continue to misrepresent themselves. The highly motivated and serious deceivers are the least likely to disqualify themselves by making admissions against their own interests.

Another major difference between employment screening tests and those used for the investigation of specific incidents is the type of relevant questions asked in those two situations. A relevant question such as "Did you take that $1,000 from the safe last week?" is very specific. The subject is absolutely certain of the truthfulness of the answer given, and the control question test can be properly applied and interpreted. However, commercial screening tests typically use a long series of questions which includes many relevant questions such as:

Did you tell the complete truth on your job application?

Are you seeking a permanent position with this company?

Have you ever stolen anything from a previous employer?

Have you ever cheated an employer?

Have you ever committed an undetected crime?

Have you ever used illegal drugs?

Such questions are extremely vague, cover long periods of time in the prior life of the subject, and most people might consider minor acts to be included in the questions. Some prospective employers even ask questions which pry into personal areas such as sexual preferences, political and religious beliefs, and union activities.

Typical relevant questions in a commercial screening test are very similar in content and psychological impact to the control questions used to identify innocent persons in specific incident investigations. They are likely to produce strong concerns and accompanying physiological reactions in the most honest and moral individuals, which would result in apparently deceptive results on the polygraph screening test and subsequent disqualification of such persons. In a scientific national poll reported by the Associated Press on 2 March 1986, 65% of the respondents indicated that they would agree to take a polygraph screening test for a commercial job. However, only 37% agreed that prospective employers should have right to require such tests.

The federal government has many polygraph screening programs for positions which involve access to sensitive and classified information. Some federal polygraph programs, such as those of the National Security Agency and the Federal Bureau of Investigation, suffer from many of the problems associated with the use of vague relevant questions and the relevant-irrelevant technique. However, the proposed large-scale counterintelligence screening program of the Department of Defense has specifically limited the scope of the relevant questions to knowledge or prior acts concerning whether the examinee has:

Ever engaged in espionage or sabotage against the United States

Knowledge of anyone who is engaged in espionage

Ever been approached to give or sell classified materials to unauthorized persons

Ever given or sold classified materials to unauthorized persons

Knowledge of anyone who has given or sold classified materials to unauthorized persons

Any unauthorized contact with representatives of a foreign government

Those restrictions make the relevant questions on the counterintelligence screening test similar to the relevant questions used in specific incident investigations, and many problems associated with commercial employment screening tests are minimized by the Department of Defense approach. In the aforementioned Associated Press poll, 81% of those polled agreed with mandatory periodic testing of government employees with access to classified information. Obviously, the public distinguishes between applications of polygraph tests for national security purposes and their uses by commercial employers. Similar distinctions were drawn by the Employment Committee of the British House of Commons when they stated in their report of 11 February 1985 that "the use of the polygraph in employment situations is undesirable and of insufficient reliability. . . We are in no doubt that the use of the polygraph has unwelcome implications both for employment practice and for the rights of individuals. . . The field of national security presents special problems."

The use of polygraph tests for investigating specific incidents within the employment context is not without problems. The situation is coercive and likely to engender resentment when employees are required to take and pass a polygraph test in order to keep their jobs. In the Associated Press poll, although 65% said they would not object to taking a polygraph test requested by their current employer, only 27% agreed that employers should be allowed to require such tests. Obviously, the mandatory use of such tests is likely to arouse resentment in a large proportion of employees. That may result in a high rate of false positive errors, and it raises questions about the possible negative impacts of such tests on employee morale, company loyalty, and productivity. It seems obvious that security procedures and loss prevention programs which discourage and deter dishonesty on the job are preferable to polygraph tests which engender a less desirable work environment.

Commercial polygraph tests can be highly abusive and destructive to the examinee. In 1980 a civil case was tried in Florida against a national chain of discount department stores and the largest commercial polygraph firm in the country. It concerned a mandatory polygraph test administered during the investigation of a series of internal thefts of money. After an incompetent and superficial investigation, the polygraph examiner was summoned to solve the problem. He tested 10 employees at the store, but declared them all to be truthful. Needing to find a culprit, they focused on the assistant manager of a nearby store who had been transferred from that store. He "failed" his first required test, demanded another test, and "failed" that one also. During the process, they forced him to sign a confession to borrowing $.35 for one day from the sunshine fund, an extramarital one-night affair with another employee, keeping $1.00 which he found on the floor, and adding a total of 10 miles to reimbursement vouchers over a period of several years. The final blow was his required confession to having taken a safety pin from the store to temporarily repair his broken pants zipper so that he could wait on customers one afternoon when he was short of help. After he was fired for violating company policy based on those admissions, the actual culprit was identified when he failed a polygraph test administered by the first examiner and confessed to a subsequent theft from the same safe. It was obvious that he had committed the previous thefts for which the assistant manager had been fired, but the company did nothing to make amends for their error because they insisted that the previous polygraphs had provided the answer. Although he filed suit and eventually settled for $250,000, the man's career and marriage had been destroyed, and the money could not repair his personal life or restore his self-esteem.

## Examiner Training and Competence

The proper administration and interpretation of a control question test or any type of polygraph test requires considerable psychological and psychophysiological training and sophistication. In those areas, commercial applications of polygraph techniques are particularly lacking. The typical commercial polygraph examiner has little or no formal education beyond high school except for polygraph training in a 6-week trade school operated by similarly uneducated polygraph examiners. Even the federal polygraph school operated by the U.S. Army is substandard in terms of its reliance on many outdated and unscientific concepts of psychology and physiology and its failure to utilize instructors who have adequate academic backgrounds and psychological expertise. Commercial polygraph examiners often come from a police or military background and are psychologically insensitive and unskilled in interview techniques except those designed to elicit confessions. Those who conduct screening tests for commercial employers are usually the least capable and least scrupulous. However, the polygraph examination is a difficult and demanding technique which is employed in psychologically complex and fragile situations. Because of those and other problems, the American Psychological Association resolution includes the statement that **"Those giving polygraph tests often have limited training and expertise in psychology and in the interpretation of psychophysiological measures."**

Such problems are characteristic of the large majority of polygraph examiners, most of whom conduct tests in commercial situations which would be prohibited by the passage of S. 1815.

A related problem is the time required to conduct a proper polygraph examination and the cost of such a test. The administration of a control question test for investigative purposes usually requires two or more hours in a carefully controlled environment free from distraction, discomfort, and coercion. However, it is not uncommon for commercial tests to be performed in less than 30 minutes under unacceptable conditions. I have encountered instances of 15-minute mandatory tests conducted for employers. In a Connecticut case, the employees were required to submit to polygraph tests conducted in the unheated lube bay of a gas station during the winter with the polygraph instrument positioned atop an oil drum and a bare light bulb hanging from the ceiling. The employees who were terminated on the basis of the outcomes of those tests or refusal to take the test were awarded $219,000 in damages, but the same polygraph company continued to operate and is the defendant in a current lawsuit.

The time required for the test and the competence of the examiners are integrally related to the cost of proper examinations conducted by qualified examiners. A competent examination in a criminal investigation or attorney case requires a minimum of five hours for consultations, reviewing materials, preparation of questions, conducting and interpreting the examination, and writing the report. Highly skilled examiners charge several hundred dollars for such services. However, most commercial employers pay around $35-$50 for preemployment tests and $50-$75 for specific tests. It is obvious that such fees cannot attract qualified and competent professionals, and the result is substandard and hurried work by unqualified personnel. It is no wonder that incompetent, unethical, and abusive practices abound in the commercial sector. In government and law enforcement polygraph programs, trained and competent personnel are paid salaries and are usually limited to two examinations per day.

### Justification for Polygraph Tests and Protection of Examinees

Applications of polygraph examinations in employment settings should be justifiable in terms of national and social needs and be designed to protect the rights and welfare of the examinees. Uses of polygraph tests in contexts involving national security or positions of special power and responsibility such as law enforcement must balance those sometimes competing interests. In some instances, applicants might be denied such positions on the basis of less than complete or perfect information. If polygraph examinations are to be used for screening in such situations, the tests should be carefully designed to address the most narrowly-defined and job-relevant issues. Furthermore, the results of such tests should not constitute the sole basis for any personnel decision, but should be viewed as only one piece of information to be considered in the decision process. The dissemination of information gathered by polygraph examinations must be closely controlled. Such polygraph programs in the public sector are regulated by statutes and administrative procedures. However, considerably more research is needed to develop methods to reduce the error rates as much as possible in order to increase the effectiveness of the programs and minimize the potential harm to individuals.

It is more difficult to justify and regulate the use of polygraph tests in the private sector. The level of competence and integrity of the examiners is frequently substandard, and the commercial interests of the employer tend to override the need for high quality professionals and protection of the rights and welfare of the applicants and employees. Even though many states have enacted legislation which prohibits employers from denying employment solely because of refusal to submit to or having failed a polygraph test, such laws do not provide adequate protection. When a person is found deceptive on a polygraph examination adminstered by an employer or prospective employer and is not hired or is terminated for that reason alone, it is often difficult to prove that the polygraph test was the sole basis for the action. The employer usually claims that the person was not selected for other resaons or was terminated for "violation of company policy." I have seen instances where employers appear to have used the polygraph to deny employment based on polygraphers' assessments of sexual preferences, political beliefs, and union activities but have given other explanations for taking action against them. I am also aware of situations where employers have used the polygraph as a guise to terminate current employees because of their race. The only way to eliminate such abuses is to eliminate the use of the polygraph in the private sector.

The vast majority of major, successful companies in this country do not use polygraphs for personnel purposes and do not oppose the provisions of S. 1815. However, some users have argued that particular industries and occupations should be exempt, claiming that special problems exist in their industry and they have a special need to protect the public. Such arguments are uncompelling for a number of reasons. First, there is no means to assure that competent and ethical examiners will be utilized and that adequate resources and care will be devoted to the polygraph testing programs. Second, there is no simple way to ensure that failed polygraph tests will not be used as the sole basis for negative employment decisions. It is cheaper and quicker to act solely on the polygraph result rather than follow up with an expensive and time-consuming background investigation. Many companies have come to rely on polygraphs for a "quick fix" in order to save time and money in hiring, especially for relatively low level and low-paying jobs. They simply cannot afford the resources necessary to conduct meaningful polygraph examinations and follow-up investigations, especially in light of the large numbers of truthful people who undoubtedly fail such tests even with the most optimistic estimates of accuracy. Third, using the same optimistic accuracy estimates which were used to illustrate how the base rate problem results in wrongful rejection of large numbers of honest people, it is also clear that there are serious risks in relying on polygraph tests to detect the very individuals whom industry claims are major threats to their operations. At least 1 of every 10 undesirable applicants would be hired for those jobs, and the erroneous polygraph results would essentially give them the opportunity to cause the damage which the use of the polygraph test was supposed to prevent.

Many of those who have been pushing for exemptions claim that in order to protect the public served by their industry, they must screen out persons with certain undesirable preferences and traits. That usually involves asking questions about lifestyle and invasions of privacy for the ostensible purpose of attempting to predict their propensities to engage in unacceptable sexual acts or other proscribed behaviors such as drug use. Such uses of the polygraph are not only offensive and an affront to the basic principles of our society, but they are the very applications of polygraph methods which are most likely to produce erroneous results and severe embarrassment and damages to those who are forced to undergo such demeaning and inaccurate procedures.

In the commercial setting, most individuals have little meaningful control over the effects of negative information produced by polygraph tests. Failure to pass such a test usually results in that individual being fired or not being hired. Frequently, they are unable to obtain employment elsewhere because other prospective employers obtain from that employer the adverse information derived from the polygraph examination. Although formal remedies may be available to such individuals, in the private sector the individual often must engage in a costly, time-consuming formal action to obtain redress of such grievances. Ultimately, many individuals must obtain legal counsel and file suit in order to obtain a satisfactory outcome. Considering the expense and time required to pursue such action, most people have neither the time nor the resources to do so. Those who most need the employment and are least prepared to deal with the system are the most common polygraph victims.

### The Polygraph Industry

As the abuses by commercial polygraph examiners and their clients have become more visible; scientists, responsible professional organizations such as the American Psychological Association, employee organizations, and social and political leaders have called for regulations and legislation to reduce the problems. One by one, more than half of the states have adopted legislation which restricts the use of polygraphs by private employers. In response to those pressures, the American Polygraph Association, which is the national trade organization for polygraph examiners, has taken various actions. Instead of adopting priorities for scientific research to improve polygraph accuracy, improved training and professionalism, and protection of the public from abuses; the national and local polygraph trade organizations have devoted most of their efforts to protecting the short-term economic interests of commercial polygraph examiners. They have attacked their critics, attempted to defeat progressive legislation at the federal and local levels, and attempted to substitute self-serving regulatory legislation. The February 1986 Newsletter of the American Polygraph Association reported having received contributions of $24,010 to fight anti-polygraph legislation and $295 for research. It is obvious where their priorities lie.

The polygraph industry has established political action committees and engaged in major fund-raising efforts to defeat S. 1815 and similar bills in the House of Representatives and state legislatures. They have also engaged in campaigns to discredit and interfere with the scientific and professional activities of individuals who have worked to protect the public from exploitation by unscrupulous and incompetent polygraph examiners. Unfortunately, many of those self-serving activities have been aided and promoted by persons who are employed by the federal government in positions with major responsibilities for federal polygraph programs.

The most blatant example of conflict of interest is Norman Ansley, the chief of polygraph programs for the National Security Agency, who has served on the board of directors of the American Polygraph Association and has been the editor of their publications since their inception in 1972. He has used their publications as a platform from which to promote the economic interests of private polygraph examiners and to attack their critics. He has railed against the American Psychological Association, scientists and other professional psychologists who point out the problems produced by inaccurate techniques and incompetent examiners, and politicians who sponsor legislation to correct the problems.

Other examples of the misuse of federal offices and influence to further commercial polygraph interests are provided by Ronald Decker, the Director of the U.S. Army Polygraph School which trains almost all federal polygraph examiners, and Robert Brisentine, who heads the polygraph section of the U.S. Army Crime Records Center. Both of those federal officials have served as president of the American Polygraph Association, promoting commercial polygraph interests and attacking responsible scientists and critics. Similar efforts have been undertaken by Paul Minor, the director of polygraph operations for the Federal Bureau of Investigation and a vice president of the American Polygraph Association. Ronald Furgerson, Mr. Minor's superior at the F.B.I., and Mr. Brisentine have engaged in efforts to deny U.S. Army research funds to scientists who constructively criticise polygraph programs. Mr. Ansley has gone so far as to restrict the distribution list for descriptions of National Security Agency polygraph research funding programs and requests for proposals in order to prevent scientists who are critical of commercial polygraph applications from applying for federal research funds.

The other major activity of the polygraph lobby is the promotion of the Polygraph Reform Act of 1985 as a substitute for the Polygraph Protection Act. The polygraph industry bill would permit commercial polygraph examinations, establish some minimal federal standards for such uses, prohibit some invasions of privacy and violations of civil rights, and provide civil penalties and some relief for violations. Unfortunately, the industry bill is very self-serving. It would permit voice stress analysis, provide a grandfather clause to circumvent certification requirements for those already in polygraph practice, permit examiners to conduct as many as 12 polygraph tests per day (a maximum of 2 examinations per day is the accepted standard among many federal agencies), and sanction the use of life-style questions about "sexual preferences or activities" in some industries. In order to obtain relief and/or damages, any person who is given a polygraph examination in violation of the provisions of the act would have to file a suit in federal court and would be allowed personal compensation only to the extent of unpaid minimum wages or overtime compensaton as determined under the Fair Labor Standards Act of 1938. Obviously, such a bill would do little to discourage the present abuses and provide meaningful compensation to their victims.

## Conclusions and Recommendations

The lack of a scientific basis for commercial polygraph procedures, the sorry state of affairs in the polygraph industry, the frequent abuses produced by misapplications of polygraph techniques by incompetent polygraph examiners and insensitive and poorly informed employers, and the difficulty of correcting those problems by regulatory legislation is lamentable. For many years, the polygraph industry as been given encouragement and opportunities to correct those problems. Instead of taking constuctive steps to improve their techniques, raise their levels of competence and professionalism, and eliminate abuses; the polygraph industry has chosen only to attack its critics and resist reform. As a result, the problems have not been solved while the amount and extent of polygraph uses and abuses have grown dramatically. Given the intransigence of the polygraph industry, the best available option is the elimination of those practices by the adoption of S. 1815.

If S. 1815 is passed and signed into law, many important applications of polygraph techniques would continue in government programs, law enforcement investigations, and judicial proceedings. Some of those uses are controlled by federal and local statutes and regulations. However, in a number of states many such applications are not regulated by statute, and many states and some federal agencies have no licensing or certification procedures or requirements. All polygraph programs which remain after the passage of S. 1815 should be highly regulated. The State of Utah adopted a licensing act for polygraph examiners in 1973, and it has been updated and vigorously implemented over the years. Such regulation and higher standards of training and performance should be applied to all polygraph examiners in the United States to assure the highest possible level of competence and integrity and to protect the public interest and the interests of those who undergo such examination procedures. Since polygraphs are utilized in ways which affect national security, criminal investigation, civil liberties, and individual rights and freedom; there is no room for anything less than the highest standard of excellence in training and applications. The passage of S. 1815 and strong regulation of the remaining applications are necessary to achieve those goals.

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23 May 1986

Senate Committee on Labor
and Human Resources
428 Dirksen Senate Office Building
Washington, D. C. 20510

Attn: Kay Morrell

Dear Senator Hatch:

Enclosed is the corrected copy of the hearing transcript on S. 1815. I have made a few minor corrections.

I looked over the questions submitted by Senator Quayle. Unfortunately, I do not consider myself an expert on many of his inquiries and feel unable to provide answers to many of his questions. Some of his questions fell within my area of expertise, and I believe they have been addressed in my written statement and my oral testimony at the hearing.

Thank you again for the opportunity to be of assistance on this important legislation.

Sincerely,

David C. Raskin, Ph.D.
Professor

DCR/dj

enclosure

The CHAIRMAN. Well, thank you, Dr. Raskin.

I would just like to say, as one of the recognized experts on polygraphing in the United States, I would appreciate your comments on the effectiveness of the States which regulate the use of the lie detector test, polygraph examination.

Dr. RASKIN. Well, I think that the effectiveness has been more in specific applications and in criminal investigation than it has been in the employment context; that employers have found ways to get around these.

I have been involved, for example, in lawsuits in the State of Connecticut, where they are not legal, and yet they are going on, and they bring in polygraph examiners or send people out-of-State, but they even do it within the State. And I think it has generally proven to be ineffective in the commercial sector, because there are fewer controls that can be exercised.

The CHAIRMAN. Now, I notice that you have brought a polygraph examination machine with you. I wonder, could you take a moment and explain to the committee how the machine works, tell us a little bit about it? Would you like to come up and point it out to us?

Dr. RASKIN. Yes, Senator.

Basically, this instrument simply measures physiological responses, and this particular instrument measures breathing, blood pressure. And these attachments which are here, particularly this one here in my hand, measures the activity of the sweat glands in the hands. These are very sensitive responses.

If I could just turn this on and show you how sensitive they are, it would give an indication of some of the problems, because in order to run a test like this, you have to have extremely great control of the situation. And many of the commercial applications ask vague questions under very poor circumstances, and each reaction occurs for a variety of reasons.

For example, I am going to take a deep breath now, and you will see that pen rise dramatically like that. Many polygraph examiners think that that is an indication of deception, when in fact, all I have done is take a deep breath. This shows how sensitive these things are to a variety of factors, and there is no specific pattern that can be truly identified with lying with any degree of accuracy. It requires a very carefully conducted test by a skilled examiner who is psychologically sensitive to specific issues, and is properly interpreted.

The CHAIRMAN. So each one of these attachments would add even more of a reaction, I take it?

Dr. RASKIN. Yes, that is right. Each one of these would show changes, and you would maybe see blood pressure changes, breathing changes, and so on. And all of those can be produced by a variety of things, conditions, et cetera.

The CHAIRMAN. All of those could be interpreted by a very skilled examiner with a lot of experience.

Dr. RASKIN. A skilled examiner can do a very good job.

The CHAIRMAN. You have indicated 85 percent accuracy. What if you had just a 5- to 15-minute polygraph examination. How would the accuracy percentage go? Would it go up or down?

Dr. RASKIN. Well, with a 5- to 15-minute polygraph examination, there could be no chance of any kind of reliable result, and in fact, on truthful people, it may be less accurate than on someone who is lying.

The CHAIRMAN. So literally, if you want to have an accurate examination, you have got to have a very good examiner who conducts a rather lengthy examination of 2 hours or more, and you have got to have an examiner who understands how to make an appropriate analysis of the material that arises as a result of the polygraph examination?

Dr. RASKIN. That is right.

The CHAIRMAN. And without an accurate correlation of all three, it is very unlikely you are going to have a really accurate test?

Dr. RASKIN. That is true.

The CHAIRMAN. Is there any other factor that might enter into it? I have given you three broad categories, but is there anything else you would put into that consideration?

Dr. RASKIN. Yes. I would add to that, certainly, there is the problem of the context in which the test is conducted, and in the employment context, it tends to be coercive, and there is little choice of the examinee as to whether or not to take the test. That is quite different, of course, from law enforcement investigation. So those coercive elements, the pressure that is put on the individual, can produce a higher rate of error and also be disruptive in terms of the work environment.

The CHAIRMAN. Just one more time. The examiner has to be a quality examiner, very well-qualified, with a lot of experience. The test, in order to be accurate, or at least to have that high degree of accuracy, the 85 percent we are talking about, would have to be conducted over an extensive period of time, actually measured in hours, not minutes—am I correct in that?

Dr. RASKIN. Right.

The CHAIRMAN. And third, there has to be an effective analysis of the data and the line drawings that literally, the polygraph machine comes up with; is that correct?

Dr. RASKIN. That is correct, Senator.

The CHAIRMAN. In addition to that, you have other extraneous matters that also add to whether or not the polygraph examination is an accurate examination.

Dr. RASKIN. Yes. There are two things that I would like to add to that. One is that the test should be specifically designed to assess a person's involvement in some past act; and second, vague lifestyle kinds of questions which get into personal issues present substantial problems. That is where I have a problem with some of the amendments.

The CHAIRMAN. I see. What you did say, and I find it very intriguing, was if you have all three of those requisites are put together in an accurate and maximized process, still, if you only do the 5- to 15-minute examination, those who do tell the truth might be found more deceptive than those who do not?

Dr. RASKIN. That is correct.

The CHAIRMAN. So in other words, this really would be a means of really hurting a lot of people in an application for employment context?

Dr. RASKIN. Yes, Senator. I think we are talking about 100,000 to 200,000 people a year at least, in this country——

The CHAIRMAN. Yes—I mentioned 50,000. I think that is a high number of people. If you are talking 100,000 to 250,000 people a year who might possibly be mistreated as a result of inadequate or improperly administered or in some cases, really faulty polygraph examinations, that is a pretty high thing.

Dr. RASKIN. Yes, I think so.

The CHAIRMAN. That is one of the reasons why I have cosponsored this bill. I do see some of the arguments that industry is making, and they do have to have some methods, certainly in certain industries, to find out what they can do to protect the public and even fellow workers and even the industry itself.

But there is a real question on tradeoffs here whether this is the way to do it or not.

Dr. RASKIN. I think what you are doing here with this bill is a major step to improve the situation.

The CHAIRMAN. Well, the fact of the matter is if most businesses really did what needed to be done, a 2-hour polygraph examination for each person they wanted to test, including employees that they are concerned about during the employment context, most of them probably would not do it because of the expenses involved; is that correct?

Dr. RASKIN. I think that is correct. Industry tends to pay $35 to $50 for each of these tests, and there is no way they can get a proper test from a qualified trained professional for that kind of a fee.

The CHAIRMAN. What would you think a qualified trained professional's test would range, if you could?

Dr. RASKIN. Well, to do these properly, Federal standards, for example, are no more than two examinations a day; and if you talk about a highly trained person who is going to make a reasonably good salary, you are talking about many times what industry is paying now.

The CHAIRMAN. I remember when Senator DeConcini and I were assigned by the Senate Judiciary Committee—and this will be my last question, because I have run out of time—to go down to the Bahamas and meet with Robert Vesco. Jack Anderson was with us, and we administered a polygraph examination to him—we did not do it, but a trained, very well-recognized polygraph examiner did. He asked at the most, I think, four to six questions over what was really a 3- to 4-hour polygraph examination—which, by the way, Mr. Vesco passed, which was very interesting to us.

But I remember at that time, he said you could not ask a whole variety of questions. You had to limit them, you had to know what you were doing, and it had to be a very extensive process—which it was. I was amazed at that. You are saying that would be a much more accurate examination.

Dr. RASKIN. Yes, Senator. Typically, three or four specific relevant questions are included in a criminal investigation-type test, and they are very specific.

The CHAIRMAN. Thank you. I have used my time.

Senator Kennedy.

Senator **Kennedy**. What percent of the private sector has the kind of competent and trained individuals to give these tests which you think would result in accurate results?

Dr. **Raskin**. Well, Senator, it is difficult to estimate that. In my experience, I have been generally very disappointed in what I have seen coming from those sources. So I would say if one out of three or four examiners operating under those circumstances is reasonably trained and doing a good job, I would be surprised that it would be that high.

Senator **Kennedy**. And the competency affects both the nature of the preliminary questions, and then I suppose it also is reflected in the analysis of the results?

Dr. **Raskin**. Yes, Senator. And also I think the lack of psychological sophistication of these people, just in terms of conducting the interview and being sensitive to the problems that that can produce on the charts themselves is a major difficulty, and they do not understand how to interpret these things when they see the charts. That is why the American Psychological Association has pointed that out as one of the major problems.

Senator **Kennedy**. Have you reviewed the kind of standard tests that are being applied in terms of employment requirements?

Dr. **Raskin**. Yes, I have seen many examples of those.

Senator **Kennedy**. And have you any comment that you would like to make as to whether they can really do what they are intended to do?

Dr. **Raskin**. Yes. I think they are poorly designed to accomplish the purposes that they want to accomplish. The questions tend to be vague, difficult to answer for almost anybody; too many questions, too many personal issues, too many things which one could not draw any conclusions whatsoever from, and yet they tend to rely on these for some unknown reason.

Senator **Kennedy**. Well, why do they structure it that way? Obviously, I would imagine they would want to have competent examiners and competent exams, competently interpreted.

Dr. **Raskin**. Well, Senator, I think there are two reasons. One is that the people who employ polygraph examiners to do this, tend to be business people who are experts in other areas, and they get sold a bill of goods essentially by the polygraph people in terms of how this magic technique is going to save them from all kinds of problems.

The second thing is that when you include that many questions, and you put tremendous pressure on individuals and say, "If you do not admit every little thing that you are concerned about, you are going to fail this test," and then they make minor admissions that almost anybody could make about having not paid for their coffee at the coffee pot or something like that, they write all those things down and report them to the employer and disqualify them on that basis, particularly if they have other reasons to disqualify them. So they find it a handy tool, and they use whatever little bit of information they can get to accomplish their purposes.

Senator **Kennedy**. That gets back to the friendly polygrapher or the unfriendly polygrapher, and I suppose it would be fair to say you probably ought to polygraph the polygrapher.

Dr. **Raskin**. Yes, if the techniques were working well.

Senator **Kennedy**. Thank you, Mr. Chairman.

The **Chairman**. Thank you, Dr. Raskin. We appreciate your testimony, and thanks for bringing the machine along and explaining it in part to us. Thanks so much.

Dr. **Raskin**. Thank you, Senator Hatch and Senator Kennedy.

The **Chairman**. The first panel we are going to call will consist of Mary Braxton, of Toano, VA, who is accompanied by her attorney, Willafay McKenna. And of course, we are happy to welcome William Wynn, president of the United Food and Commercial Workers Union. Mr. Wynn is accompanied by Mr. Michael Tiner.

We are happy to welcome both of these witnesses to our committee.

We will begin with Ms. Braxton. Now, I understand you are a little bit nervous, so you just relax. You are in good company, and we do want to hear what you have to say, and we will just turn the time over to you, Ms. Braxton.

## STATEMENT OF MARY C. BRAXTON, TOANO, VA, ACCOMPANIED BY WILLAFAY McKENNA, ESQ.; AND WILLIAM H. WYNN, PRESIDENT, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, WASHINGTON, DC, ACCOMPANIED BY MICHAEL TINER, ASSISTANT DIRECTOR OF GOVERNMENTAL AFFAIRS

Ms. **Braxton**. Good morning. My name is Mary C. Braxton, and I am from James City County, VA. I am here to tell the committee about my experience with a polygraph examination.

When I was hired, I was required to sign a consent form which said that I would take a polygraph test whenever my employer wanted me to do so. The test I want to tell you about was given to me in 1978 after I had worked for my employer for 5 years.

No one knew when tests would be given on that day in 1978. I went to work as usual without any idea that I would be tested. The test results were good, as far as I knew, and I went back to work, finished out the day and was off the next day.

On my day off, my manager called me and informed me that I had to take another test. When I asked her why, she could not tell me. She did tell me I had to pay for it. When I told her I would take the test, but I was not going to pay, she said she was willing to pay for it.

A friend of mine called me just after I talked with my manager. She said she had to take another test that day, because during the first test she had some medical problem. Before she could be retested, she had to go to the hospital and pay over $100 to get cleared for the test. I took her to the hospital. We were both nervous about the test, and she gave me a valium, which I took about 10 minutes before I went in.

The examiner asked me, "Did I test you yesterday?"

I told him, "Yes, but my manager told me to come in and be retested today."

He called the manager, and after that he went about testing me again. Before he hooked me up, he went over some questions, like my name, whether I worked for the employer, how long I had worked there, and what was my position. He also asked me questions about whether I had ever stolen, or if I knew of anyone who had. He did not write anything down, and I am not sure now whether he asked me all these questions before he hooked me up or while I was on the machine.

After the test, he looked puzzled and said something like, "Are you sure this is it?" or "Is this all?" I felt like he was not satisfied with the way the test had come out.

He asked me some questions about money at the pottery, and I told him that I sometimes found money when I swept the floor. We had a cup over the register, and when we found money on the floor, we would put it there for anyone who needed some extra change for cokes or things.

He then wrote up a statement saying that I had stolen $5 or $10 from the pottery. I refused to sign it. He got mad and threw the papers across the desk and onto the floor. At that point I got very nervous and wondered what in the world was going on. I was still doing 100 shakes a minute—as I am doing now. He would not test me again if I would not sign the paper. I agreed to sign the paper if he would give me another test, and the test would clear me. He retested me—it lasted about 5 minutes or less, because he went through the questions real fast. I spent no more than 20 minutes with the examiner that day.

After that, he showed my "confession" to my employer. He did not show them the test results. I had reported back to my building and was informed later that I had no job.

One of the employees walked up to me and stated that he stole every day, and he had taken the test, too, but had not gotten caught.

I felt betrayed, because I had built myself up on the job and had worked hard for my employer, and all of a sudden everything was gone. I was branded as a thief. I could not face the world, my friends, and my kids. When I told my kids, they felt bad about me being fired, and they could not understand because they said, "Mama, you don't steal."

They had a rough time in school, too, after that because other kids said that their mother had been fired because she stole.

My friends were supportive. They came by and told me I should fight the Pottery on this. I did not talk to people other than my friends and family about it, because it was too painful. I cried many nights about it. I went to a doctor and got some pills to help me.

One day, about 2 weeks later, I just put it in my mind that I had to go and look for a job. While I was applying for a job, I told the owner about what had happened to me, and he told me that he had heard about it. That made me feel bad, because I did not get the job, and because someone in the community knew about it, and I thought a lot of people must have been talking about it.

I applied for a number of jobs, but no one would hire me. I finally went to the unemployment office. I did not think I would get any benefits, but I did. The Pottery appealed the unemployment decision, and I went to Legal Aid. They helped me win again, and they told me that I might sue the Pottery and the polygraph examination company. I won my case against the polygraph examiner and his company. And it took a number of years to live the story down.

Now, if I have to look for a job, I tell the employer what happened to me and that I will not take a polygraph test. If the test is required, I do not want the job. So far that has worked well for me.

I want to thank the committee for letting me tell my story. I will be happy to answer any questions.

The CHAIRMAN. Thank you, Ms. Braxton.

Let us turn to Mr. Wynn before we ask questions.

Mr. Wynn, we are happy to welcome you to the committee, and we will turn the time over to you.

Senator KENNEDY. Mr. Chairman, I too want to welcome both of our witnesses here—Ms. Braxton, for your testimony. It is always difficult to raise these kinds of questions, and it is enormously helpful to our committee. We want to thank you very much.

And I want to welcome Bill Wynn, who has spent a great deal of time on this issue, as you know, Mr. Chairman, a great deal of analysis. He has had very important experience in this area, and his testimony will be very helpful to us.

Bill, I am glad to see you.

Mr. WYNN. Thank you, Mr. Chairman.

My name is William H. Wynn. I am international president of the United Food and Commercial Workers International Union, AFL-CIO. On my left is Mike Tiner, director of Government affairs.

The UFCW represents 1.3 million members throughout 700 local unions in the United States and Canada. The UFCW and its local unions have contracts with tens of thousands of employers throughout the food processing, retail sales, leather and shoe manufacturing, and other industries.

I appreciate the opportunity to appear today to present the views of the labor movement on the widespread use and abuse of so-called lie detectors in the workplace.

With the committee's permission, I would like to briefly summarize my thoughts on this problem and submit my written statement in its entirety for the record.

For a variety of reasons, American business managers are turning increasingly to the use of several pseudoscientific devices in their attempts to ferret out potentially dishonest employees. Available data puts the number of so-called lie detector tests at more than 2 million each year, more than four times the number given just 10 years ago.

The committee will undoubtedly hear from polygraph adherents that the use of lie detectors is essential in combatting internal theft.

Theft by those within the organization can hurt, even cripple a business. It cheats honest workers out of the fruits of their labors and must be combated by both workers and management together, using all reasonable means available.

But the true extent of the losses due to employee theft is in doubt. Previously congressional testimony put the annual loss at between $15 and $50 billion. Yet a 1982 study conducted for the Justice Department by the National Institute of Justice concluded that "approximations of employee theft seriousness to society are at best educated guesses."

The same Reagan administration study estimated that securities fraud, corporate kickbacks, embezzlement, and insurance fraud cost businesses three times more than employee pilferage. And more than one-half of the losses attributable to "employee theft" resulted from shoplifting.

Placing employee theft in perspective with other forms of business loss also raises considerable doubt as to what constitutes "reasonable means" for controlling these losses.

Raising "employee theft" as a justification for using polygraph examinations puts a price tag on the Bill of Rights.

Polygraph proponents believe that if they can raise the price high enough, Congress will overlook how so-called lie detectors pervert our principles of due process.

If they truly believed that their machines prevent losses, then they would be here urging the Congress to mandate polygraph examinations of corporate officers and directors in order to curb kickbacks, embezzlement, and securities and insurance fraud; or, seeking approval to force customers to submit to lie detector tests before they shop. Indeed, they might even contend that polygraphs have a role in debates between political candidates so that the voting public would be able to choose the more "truthful" candidate.

The CHAIRMAN. Let us not go that far here, now. [Laughter.]

Mr. WYNN. I agree.

But not even the brashest polygraph apologist would propose any of the above.

No—they nominate workers and potential workers for the humiliation of being forced to submit to the 20th century equivalent of the dunking stool.

Polygraphing employees is neither the proper nor the best way for employers to reduce their losses. The National Institute of Justice study on employee theft made some important conclusions regarding how best to combat the problem, and I quote:

> More importantly to companies interested in reducing theft and counterproductive behavior is a sensitivity to the perceptions and attitudes of the work force. In short, we found that those employees who felt their employers were genuinely concerned with workers' best interests reported the least theft and deviance.

The study further concluded, and I quote:

> We found that applying the law enforcement model to theft does not work very well. For example, assessing previous theft activity outside the work setting by using polygraph exams has little relevance to future workplace behavior.

In short, Mr. Chairman, the best way to control these losses is through good employment practices. We strongly believe that polygraph testing is not a good employment practice by anyone's definition.

There is a tendency to focus on the abuse associated with polygraph testing. There are documented cases of it being used for intentional race discrimination. There are sensational cases in which sexual misconduct occurs during examination and the intrusive nature of many of the questions asked, ranging from sexual activity questions to those dealing with political or union beliefs.

These violations of workers' fundamental rights are an affront to basic human dignity. But the most pervasive abuse is that the machine mislabels innocent people as liars. Both employers and employees are hoodwinked into believing the machine can distinguish truth from deception, and deception from nervousness, anxiety, fear or intimidation.

In an attempt to inform the public about the real limitations of the polygraph, the American Psychological Association recently and unanimously adopted a resolution stating that polygraphs are unreliable.

In State after State, the polygraphers try to divert attention from the real problem—the machines just do not work. In some States, they have successfully convinced legislators that the polygraph problems will be solved by licensing statutes, or statutes which prohibit asking certain questions. But the use of polygraphs continues to increase, and the number of workers wrongfully denied employment opportunities continues to climb.

Mr. Chairman, the use of polygraphs on workers is the abuse. The testing procedure is based on fear and implemented through intimidation. It is a psychological rubber hose which has no place in today's workplace.

For a moment, put yourself in the position of the worker. You apply for a job, and everything goes well. You are told the job is yours, but first you have to pass a lie detector test. You have nothing to hide and want the job, so you agree. You take the test and then are informed that you failed. You are a "liar," unfit for employment.

This is the saddest irony of the process. You told the truth in the test, but were branded a "liar." Now, when you apply for any other job, how do you answer the question: "Have you ever failed a polygraph examination?"

I have personal knowledge that through sheer intimidation, some polygraph exams result in confessions of theft or other undisclosed information when there was none. But so would the rack and thumbscrew. Yet, none of these devices are appropriate in today's workplace.

It is time to give today's workers the dignity and self-respect they deserve in employment.

Mr. Chairman, the Congress has a history of setting uniform workplace standards for American workers. I urge the committee and the Congress to act expeditiously to ban the use of lie detectors in private sector employment by enacting Senate bill 1815.

Finally, Mr. Chairman, we do not condone theft, nor do we condone lies. As Mark Twain said: "When in doubt, tell the truth." And the truth is that lie detectors do not always tell the truth. The truth is, employers who require the tests are not always truthful about the reasons for the test.

The truth is that workers' lives have been ruined by half-truths, and only after it is too late was it discovered that someone got ahold of the wrong half.

In closing, Mr. Chairman, let me take this opportunity to thank you personally and Senator Kennedy for your sponsorship of S. 1815 and your leadership to correct this abuse of workers' rights.

The CHAIRMAN. Thank you, Bill. We appreciate having you here.

[The prepared statement of Mr. Wynn and responses to questions submitted by Senator Quayle follow:]

UFCW

## STATEMENT OF WILLIAM H. WYNN
INTERNATIONAL PRESIDENT
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION
BEFORE THE COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE
APRIL 23, 1986

Thank you, Mr. Chairman, and members of the Committee, for inviting me to testify on the use and abuse of so-called "lie-detectors" in the workplace. My name is William H. Wynn, and I am the International President of the United Food and Commercial Workers International Union (AFL-CIO).

The UFCW has some 1.3 million members organized in 700 local unions throughout the United States and Canada. The UFCW and its local unions have contracts with tens of thousands of employers throughout the food processing, retail sales, leather and shoe manufacturing and other industries.

I come to this hearing strongly supporting legislation to ban the use of intimidating, intrusive and inaccurate "lie detector" tests from America's workplaces.

My statement is divided into four parts. Part I deals with the employment and law enforcement use of polygraphs. Part II gives an overview of federal legislative efforts to prohibit or limit polygraph use, and also reviews the current status of state limitations and prohibitions. Part III is a survey of the field and laboratory studies conducted on the validity of polygraph testing, and Part IV reviews the growing use and abuse of other sorths of so-called "lie-detectors" — the voice analyzers.

**William H. Wynn**
International
President

**Jerry Menapace**
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## I. USE OF THE POLYGRAPH

### Introduction

The polygraph is the result of a combination of devices invented for medical and scientific purposes. The principal components of the standard polygraph (the blood pressure cuff, pneumatic chest tube, and galvanic skin response indicator) were invented to further medical knowledge and facilitate medical diagnoses. Their inventors claimed nothing more than that their devices could measure certain physiological actions.

In 1895, however, an Italian psychiatrist and criminologist named Cesare Lombroso claimed he could detect a lie by measuring the changes in a person's blood pressure (Lombroso, incidentally, also claimed "criminal types" could be distinguished by certain physical characteristics, including the shape of the skull). Others followed Lombroso's lead, and by 1926 the basic polygraph was complete.

The standard polygraph has three parts: a blood pressure cuff, a galvanic skin response indicator, and a pneumatic chest tube. The blood pressure cuff is attached to a person's upper arm to record changes in blood pressure. The galvanic skin response indicator measures changes in the skin's electrical conductivity, which increases when a person perspires. It consists of two electrodes which are attached to the index and second fingers of one hand. The pneumatic chest tube is strapped around a person's chest to measure changes in breathing pattern. Other components are sometimes added to the standard polygraph. For example, some polygraphs include a pneumatic tube which is stretched around a person's throat to gauge swallowing, contractions of the throat, and voice muscle tension. Some of the most "sophisticated" polygraphs can be connected to chairs with seats and arm rests wired to detect muscle pressure and body movements.

The use of polygraphs has quadrupled in the last ten years. Americans are subjected to over two million polygraph examinations every year, and the vast majority of those examinations are administered to workers and job applicants. The growing problem of polygraph and other so-called "lie detector" testing has been treated as a constitutional issue, a privacy issue, and a civil rights issue. But the single most common use of the polygraph is in employment, and the problem has become, first and foremost, one of employment opportunities. Polygraphs have become vehicles for employee intimidation and for screening out employees of political or union beliefs different from those of a particular manager. Jobs are too important, and in today's economy too scarce, to allow an inaccurate machine to dictate the employment fate of hundreds of thousands of Americans. It is time for an outright prohibition of these inaccurate and intrusive machines from the workplace.

## Employment Use

Though the Constitution and the courts protect American citizens against polygraph machines in the hands of law enforcement officials, American workers enjoy no protection by the Federal Government against polygraph machines in the hands of private employers. As a result, private employers are responsible for more polygraph examinations every year than either criminal justice investigators or the Federal Government. (Office of Technology Assessment, O.T.A., Study, p. 23).

Polygraphs are used by a variety of businesses. But they are particularly popular in businesses where the risk of theft and fraud are high and employee turnover is high. (O.T.A. Study, p. 25). For example, banks and investment firms, mail order houses, discount shops, restaurants, clothing and shoe stores, supermarkets and department stores are all heavy users of polygraphs because employees in those businesses handle large sums of money. In a survey of four-hundred major U.S. corporations, Belt and Holden of the Wichita State University College of Business Administration found that fifty percent of the commercial banks and fifty percent of the retailers that responded to their survey reported using polygraphs, and these businesses are also more likely to test all job applicants and employees instead of just a sampling. (Belt and Holden, p. 86).

The list of businesses that subject their employees to polygraph examinations covers the whole spectrum of American business. Electronic and chemical companies use polygraphs because they produce expensive products and worry about industrial espionage. Drug and liquor manufacturers, hospitals and doctors' offices use polygraphs to prevent the theft of narcotics, alcohol, and other federally regulated products. Every type of business has found a use for polygraphing employees: copper refiners, rubber manufacturers, nursing homes, public utilities, delivery companies, steel producers, freight movers, meat packers, and food and oil processors.

Belt and Holden found that 34.5% of the companies that reported using the polygraph use it in periodic surveys of employee honesty, and 34.5% use polygraphs for employment application verification. Of the companies that reported using polygraphs, 89% use them in cases of specific thefts or other irregularities.

One of the most disturbing aspects of the use of polygraphs by employers is the unlimited range of questions employees are expected to answer when they are strapped to a machine. Employees and job applicants who have undergone polygraph examinations have been asked about family problems, levels of job satisfaction, sexual preferences, whether the employee has ever been tempted to steal, intended length of stay on the job, personal finances, drinking habits, sexual activities, political beliefs, and marital relations. (O.T.A. Study, p. 32). Many unions have reported cases in which polygraphs have been used to quiz employees on their union activities, in violation of federal labor law. Polygraphs may also be used to force employees to inform on their fellow employees and to discriminate on the basis of race and sex. (O.T.A. Study, p. 31).

One person's testimony before the Labor-Management Subcommittee of the House Committee on Education and Labor shows how employers can use the polygraph to explore the private lives of their employees and prospective employees:

> During the test, he asked me if I'd ever stolen from an employer and what the dollar value was. He asked me questions, if I had sex with my wife the night before. And I told him that was none of his business. He just said, "Just answer yes or no." He asked me if I had a girlfriend, and I again told him that I didn't think it was any of his business. And he was getting a little bit mad at me for not just answering yes or no, and he began telling me again, "just answer the questions yes or no."
>
> And so he asked me also if I liked extramarital sex, and I again told him this was none of his business. Before he could jump in and interrupt me and tell me just to answer yes or no, I told him, "Well, I guess I don't have a girlfriend, so I guess I'm not involved in extramarital sex!" His attitude was a little hostile.
>
> And he told me that it was up to him whether I was hired or not at Coors Co., and that got my dander up...
>
> When I finished the test, I felt degraded, and I was disgusted and mad and just darn glad to be off it. And I also told him that he'd never get me in one of those things again. He won't. (Haze, Vol. III, 40). (Pressures In Today's Workplace, pp. 16-17).

Unfortunately, many workers and job seekers feel compelled to answer all of the polygraph examiner's questions because they know that refusal to answer a question (or refusal to take the examination at all) can mean the loss of a job.

Some of the reasons employers give for using polygraphs to screen job applicants are:

- To verify the truth of employment applications
- To eliminate potential claims for unemployment insurance, workmen's compensation and disability benefits
- To reduce employee turnover
- To screen out potential thieves
- To prevent industrial espionage
- To reveal undetected crimes

Employers who use the polygraph for on-going surveillance of their employees give these reasons for doing so:

- To keep workers honest
- To promote better employer-employee relations
- To rehabilitate valued employees whose larceny could otherwise cost them their jobs
- To increase savings and provide larger employee benefits
- To lower the cost of bonding employees
- To protect innocent employees
- To screen out misfits

Employers who use the polygraph claim they need it to combat employee theft. Even well-meaning employers have been duped into believing that the polygraph is a fast, cheap and easy solution of their problems. However, according to the Congressional Office of Technology Assessment, there do not appear to be any formal cost-benefit analyses which show the use of polygraphs reduces employee crime, and no research has been done on the predictive validity of the polygraph. (O.T.A. Study, p. 31). In addition, a comprehensive examination of employee theft by John P. Clark of the University of Minnesota and Richard C. Hollinger, commissioned by the U.S. Department of Justice's National Institute of Justice, concluded: "...assessing previous theft activity outside of the work setting (by using polygraph exams) has little relevance to future workplace behavior. However, checking on one's previous pattern of employment history and dedication to a former employer are probably much better indicators." (Clark and Hollinger, p. 38).

Estimates of employee theft (which are used to justify use of the polygraph) vary widely, and seem to depend more on the motives of the estimators than on any objective collection and analysis of credible data. The National Retail Merchants Association, for example, claims that employees in their member companies alone steal forty billion dollars every year from their employers. ("Business Buys the Lie Detector," p. 101). However, the United States Department of Commerce estimated that "inventory shrinkage" (used as a measure of all crimes against business) for all businesses totaled $26.2 billion in 1976. (Clark and Hollinger, p. 4). Inventory shrinkage, however, represents all inventory losses to business, and employee theft is only one of many sources of inventory shrinkage. As Clark and Hollinger point out:

> . . .even if one can arrive at an exact inventory shrinkage figure (usually expressed as a percent of total sales), the proportion of the figure which is attributable solely to employee theft remains intertwined with other confounding sources of loss. Factors such as clerical and billing errors, conventional thefts and shoplifting also contribute to the total inventory shrinkage level. Most inventory control experts will privately admit that parceling out the effect of employee theft from these other alternative sources of shrinkage virtually has been an impossible task. (Id., pp. 4 and 6).

The Congressional Office of Technology Assessment cites an estimate of ten billion dollars for "internal crime" in private industry annually. (O.T.A. Study, p. 31). But even that figure may exaggerate the extent of employee theft, since "internal crime" presumably encompasses other acts as well. American Management Associations estimates that employee pilferage probably ranges from five to ten billion dollars a year. (Clark and Hollinger, p. 5). But none of these figures represent anything more than mere guesstimates, and those who wish to justify polygraphing employees have more reason than others to exaggerate the figures. As Clark and Hollinger point out: "Despite the fact that employee theft is generally viewed as a problem of significant consequence, little reliable data exist regarding the phenomenon. The economic impact figures. . .seldom go beyond the level of alarmist rhetoric." (Id., p. 6).

Employers use the polygraph because they believe it is cheaper and faster than other methods of checking employment applications or controlling employee theft. The polygraph may be a dreaded machine to American workers, but to their employers it is simply a tool of convenience. According to Belt and Holden's survey of major U.S. Corporations, polygraph users rated efficiency first and moral or ethical considerations last among their reasons for using the polygraph. (O.T.A. Study, p. 31). In contrast, those corporations which do not use polygraphs cited moral or ethical implications, validity and reliability considerations, cost, and the belief that polygraphs are unnecessary and inappropriate in the business setting, as their reasons for not using the polygraph. (Belt and Holden, p. 86).

Companies which use polygraphs on their employees are looking for a "quick fix." The problems which they hope to solve by resorting to the polygraph could be addressed through less objectionable (and probably more effective) means which would benefit both employers and employees. Clark and Hollinger suggest that factors such as fairness in employer-employee relations, ethical behavior by higher management, adequacy of communication, recognition of quality performance, and competence of supervisors may reduce theft among employees. (Clark and Hollinger, p. 25).

It is clearly possible to run a profitable business, even a retail business, without resorting to the polygraph -- J.C. Penney and Sears, Roebuck are among the many which do not use polygraphs, because they know it is possible and preferable to make employment decisions and protect company assets by using less objectionable methods. (Pressure in Today's Workplace, pp. 18-19).

As Clark and Hollinger point out:

> More importantly to companies interested in reducing employee theft and counterproductive behavior is a sensitivity to the perceptions and attitudes of the workforce. . . . In short, we found that those employees who felt that their employers were genuinely

> concerned with the workers' best interests reported the least theft and deviance. When employees felt exploited by the company or their supervisors (who represent the company in the eyes of the employees), we were not surprised to find employees most involved in correcting this perception of inequity or injustice by acts against the organization. (Clark and Hollinger, p. 36).

Employers who need to protect company assets can effectively do so without the polygraph through a variety of means including:

good recordkeeping
attractive discounts for company products
a healthy organizational climate
loss prevention systems that protect assets without abusing employees
good management
senior management that is honest in its dealings with both employees and customers.

Likewise, employers can make effective employment decisions with careful interviewing procedures, clearly stated job requirements, and testing for specific job skills and talents. (Pressure in Today's Workplace, p. 19). Polygraphs are not an evil of necessity; they are simply convenient.

### Law enforcement Use

Law enforcement agencies were among the first to use the polygraph, and to this day one of the major uses of the polygraph is for investigations by law enforcement agencies and private security forces in specific allegations of criminal acts. In these situations a polygraph is typically used only after a preliminary investigation has narrowed down a list of suspects, and it is used to question suspects about a specific incident or issue. (O.T.A. Study, p. 97). Typical cases in which polygraphs are used by law enforcement agencies include rape, kidnapping, and alleged illegal conduct by public officials. (Id., p. 25).

Courts have imposed restrictions on the use of polygraphs by law enforcement agencies, however, to protect individual constitutional rights. For example, a law enforcement agency cannot legally require a person to take a polygraph examination, and as a rule, the information gathered from an examination cannot be used as evidence in a judicial proceeding unless both the defendant and the prosecution agree -- and in some courts, not even then. (Pressures in Today's Workplace, p. 15).

## II. FEDERAL AND STATE POLYGRAPH LEGISLATION

### Federal Legislation

From the 93rd Congress through the present, over forty bills have been introduced relating to the use of polygraphs. Most of the bills seeking a prohibition of polygraph use have done so couched in terms of constitutional rights and protection against the invasion of privacy. As a result, these bills invariably have been referred to the Judiciary Committee, often with joint referral to the Education and Labor Committee in the House. Many of these bills have sought to prohibit both Federal and private sector use, with a variety of exemptions for national security agencies and contractors.

By the 96th Congress, the proponents of private sector use of polygraphs began introducing "regulatory" legislation, designed to curb the abuse but not the use of polygraphs. By limiting the types of questions allowed, prescribing procedures and safeguards, and granting limited "rights" to those subjected to the tests, proponents of the polygraph hoped to legitimize the use of "lie detectors" in the workplace.

In the 97th Congress, polygraph proponents went a step further by pushing a bill not only limiting the questions asked and prescribing the procedures, but also prescribing a minimal requirement that cardiovascular, respiratory, and galvanic skin responses be recorded, and prohibiting "surreptitious" examinations. These additional requirements were desingned to outlaw the fast-growing use of "voice analyzers", which compete with the polygraph. The voice-stress analyzer (VSA) and its progeny purport to detect truth or deception from "micro-tremors" in the voice. By requiring the three physiological measurements and forbidding surreptitious testing, the polygraphers were in effect trying to ban the competition.

In 1977 and 1978, the Senate Judiciary Committee held four days of hearings on Senator Bayh's "Polygraph Control and Civil Liberties Protection Act" (S. 1845). The Committee printed a 653 page report (GPO stock #052-070-04772-1) on the hearings. The statements of the witnesses and the content of the exhibits give a clear indication of the parameters of the debate, and the casts supporting and opposing the polygraph. The practitioners and frequent procurers of such services defended the accuracy of the devices and justified their use as essential to curb employee theft. The opponents condemned the devices as intrusive, intimidating, ineffective and inaccurate, and violative of citizens' civil liberties.

It is only recently, however, that legislation to stop the use and abuse of polygraphs in the workplace has had any real prospect for success in Congress. S. 1815, the Polygraph Protection Act, which is the subject of today's hearing, and H.R. 1524, its companion bill in the House, have both received the bipartisan support necessary to move expeditiously through the legislative process.

S. 1815, introduced by Senator Orrin G. Hatch (the Chairman of the Labor and Human Resources Committee) and Senator Edward M. Kennedy (Ranking Democrat on the Committee), would prevent the denial of employment opportunities by prohibiting an insiduous employment practice that wrongfully denies job opportunities to tens of thousands of workers every year. S. 1815 would forbid private sector employers to require, request, suggest, permit or cause an employee or job applicant to submit to a polygraph test for any reason.

S. 1815 is narrowly and reasonably drawn, and applies only to private sector employers involved in or affecting interstate commerce. The bill exempts employees of the United States Government, and the governments of states, cities and their political subdivisions. S. 1815 would in no way impede the use of polygraph tests by law enforcement officers. It also exempts personnel of contractors of the Department of Defense with access to classified information.

H.R. 1524, the companion to S. 1815, introduced by Representative Pat Williams of Montana, was approved by the House of Representatives on March 12, by a vote of 236-176. Like S. 1815, H.R. 1524 exempts governmental employers. It also allows the use of polygraph tests for national defense and national security purposes. However, H.R. 1524 exempts private sector employers who claim special needs for polygraph tests, such as drug manufacturers and distributors; various security services; public utilities; children's day care centers; and nursing homes.

While I strongly support H.R. 1524 as a whole, I believe its various exemptions for private sector employers are unwise and unnecessary. The polygraph is an inaccurate, intrusive and intimidating device which has no proper role to play in America's workplaces. Businesses that use the device do not really need to do so. Twenty-one states already ban or restrict the use of polygraphs in employment, and yet employers are still able to run profitable businesses and hire honest and capable employees in those states. Jobs are too important, and in today's economy too scarce, to be lost to the polygraph machine, regardless of which industry wishes to use it.

## State Legislation

Massachusetts was the first state in the union to ban compulsory polygraphing in the workplace by providing in 1959 that: "No employer shall require or subject an employee to any lie detector test as a condition of employment or continued employment" (Annotated Laws of Massachusetts, Chap. 149, Sec. 19B). (For a summary of all the state statutes which ban or restrict the use of polygraphs in employment, including the current Massachusetts law, see Appendix A of this document). During the following ten years other states followed Massachusetts' lead and enacted varying forms of of legislation designed to protect workers and job applicants from the polygraph and other forms of so-called "lie detectors": California (1963); Oregon (1963); Alaska (1964); Rhode Island (1964); Hawaii (1965); Washington (1965); Delaware (1966); Maryland (1966); New Jersey (1966); Connecticut (1967); and Pennsylvania (1969).

Today, the use of "lie detectors" in the workplace is banned or restricted by statute in twenty-two states plus the District of Columbia. State statutes generally seek to protect employees and applicants for employment from being required to take lie detector examinations. But half the states which forbid an employer to require a lie detector examination allow an employer to solicit or request the same examination:

California
Hawaii
Idaho
Iowa
Maryland
Montana
Oregon
Pennsylvania
Rhode Island
Vermont
Washington

California, for example, forbids an employer to "demand or require" a lie detector examination, but says nothing that affects employers who would "merely" request such a test -- allowing an employer the right to pressure employees and job applicants with the implicit threat of the loss of employment for those who refuse to avail themselves of the opportunity to take the test. For example, an employer can tell his employees that they are suspected of stealing but they will not be fired if they can prove their innocence by some means, such as by taking a polygraph examination.

Other states have forbidden employers to either require or request employees and prospective employees to take lie detector examinations:

- Alaska
- Connecticut
- Delaware
- Maine
- Massachusetts
- Michigan
- Minnesota
- New Jersey
- New York
- West Virginia
- Wisconsin

.However, even these states allow employees and job applicants to "voluntarily" take lie detector examinations. Undoubtedly the drafters of these laws felt it would only be fair to allow employees and job applicants to prove their innocence by submitting to lie detector examinations. Unfortunately for these "volunteers," the polygraph can be as likely to condemn an innocent and truthful person as it is to clear him (see Section III of this testimony for a discussion of studies which show the false positive rate of the polygraph may be as high as fifty percent).

These state statutes speak eloquently of the desire of state legislators to protect employees and those who seek employment from the indignities and dangers of so-called "lie detectors." But these state prohibitions and restrictions are inherently inadequate. Many employers skirt state law by simply hiring in a neighboring state with no restrictions, and then "transferring" the employees into the state which has lie detector restrictions. As long as neighboring states allow job seekers to be polygraphed, applicants for employment can simply be required to cross a nearby state border to submit to what their own state forbids. Chain stores which operate in more than one state find it particularly easy to evade these state laws. This simple circumvention of state laws can only be stopped with Federal legislation. Otherwise, employers who are intent on subjecting their employees and prospective employees to polygraphs and other "lie detectors" will continue to find it is a simple and inexpensive proposition to evade the law merely by crossing state borders.

Thirty-one states have imposed various licensing requirements for polygraphers, either as the sole legislative "protection" against abuse, or in conjunction with other restrictive statutes:

Alabama
Arizona
Arkansas
California
Florida
Georgia
Illinois
Indiana
Iowa
Kentucky
Louisiana
Maine
Massachusetts
Michigan
Mississippi
Montana
Nebraska
Nevada
New Mexico
North Carolina
North Dakota
Oklahoma
Oregon
South Carolina
South Dakota
Tennessee
Texas
Utah
Vermont
Virginia
West Virginia

However, granting formal legal recognition in the form of state licenses to individuals who ply their trade in a field where validity is so seriously in doubt raises serious concerns about the role of governments in legitimizing a very questionable employment practice.

Licensing laws are counterproductive if the goal of legislators is to protect citizens from abuse at the hands of "lie detectors." Licensing requirements cannot ensure the validity of the examinations. The dangers of "lie detectors" result from much more than the qualifications of the individuals who administer the tests. The danger, and the irony, of polygraph licensing statutes is that they legitimize the machines, their operators and the entire pseudo-scientific process of "lie detecting." The result of this erroneous and misguided legitimation is an increased use of these "lie detectors." A survey reported in Personnel Journal in February, 1978, makes the point succinctly:

> Among all firms surveyed there is a substantially greater proportion of firms using the polygraph in states which legally prescribe licensing and training requirements for polygraph examiners than there is in states which do not regulate the practice in any way. Furthermore, there is a greater tendency for firms in regulated states to require (as oppose to request) the tests as a condition of employment or continued employment than exists in states where such regulation has not been effected.

Thus licensing statutes thwart the best intentions of their supporters. They begin as efforts to protect people and yet result in even greater abuse. The legislative histories in several states show legislators first tried to eliminate the abuses in employment by requiring the licensing of operators. But problems persisted and legislators passed even more restrictive statutes. Statistics indicate the abuse of polygraphs in employment has worsened, not improved, despite well-intentioned statutes in several states. The time has come for outright Federal prohibition of this abusive employment practice.

## III. VALIDITY

Polygraph "validity" is the extent to which the polygraph can accurately detect truth or deception. In other words, "validity" is the measure of whether the polygraph can do what its proponents claim it can do.

There are basically two types of validity studies: "Field" studies and "laboratory" studies. Field studies of polygraph validity are studies of actual cases in which polygraph examinations have been administered (usually to criminal suspects), and the researcher has no experimental control over the circumstances in which the crime or other event happens. In most field studies of polygraph validity the polygraph examiner's decisions are compared to a subsequent determination of guilt or innocence (such as a judicial decision or a confession), in order to determine whether the polygraph examiner's decision was correct. This is probably the greatest weakness of field studies: the subsequent decisions of guilt or innocence may be wrong because courts may release guilty individuals, convict innocent people, dismiss cases for lack of evidence, and accept guilty pleas that result from plea bargaining. (O.T.A. Study, p. 39).

Laboratory studies of polygraph validity, on the other hand, use field methods of polygraphy, but in simulated and controlled situations in which the researcher sets up a mock "crime" and assigns "guilt" or "innocence" with the collaboration of the polygraph examinees. (O.T.A. Study, p. 61). The weakness of such laboratory studies is that the mock "crimes" do not present the "guilty" subject with any serious consequences for being "caught" by the polygraph, and thus the mock "criminals" may not display the same emotional reactions found in real criminals or liars. (Taylor, p. 241).

Considering the extent to which polygraphs are used by private employers, government, and law enforcement agencies, surprisingly little serious research has been done on polygraph validity, particularly as polygraphs are used by business. The results of polygraph validity studies vary widely, depending on the methodology used, the motives of the researchers, and many other factors. It would be impossible to assign any single number as the single and correct validity level of the polygraph. The best way to understand the validity of the polygraph is to review and analyze several studies as a whole.

**Laboratory Studies**

1. In 1975 two researchers from the University of Utah named Barland and Raskin conducted a study of polygraph validity involving seventy-two student volunteers. A mock "crime" was set up involving the theft of a valuable object or a small sum of money. Half the students were assigned a "guilty" condition and the other half were assigned an "innocent" condition. Each student was then administered a polygraph examination.

The result was that 35% of the polygraph examinations were inconclusive and 12% were incorrect. Of the incorrect examinations, two-thirds were false positives (that is, two-thirds were "innocent" subjects classified as guilty by the polygraph) and one-third were false negatives (that is, one-third were "guilty" subjects classified as innocent by the polygraph). Only about half (53%) of the test subjects were correctly identified by the polygrapher. (O.T.A. Study, pp. 655-66).

2. In 1978 an extensive validity study by Podlesny and Raskin indicated that behavioral observations alone were more effective than the polygraph in correctly identifying "guilty" subjects. This study required polygraphers to make decisions of guilt or innocence based on visual observation of the test subjects, without using the polygraph. Visual observations alone produced these results: a) among the "guilty" subjects, 86% were

correctly classified; b) among the "innocent" subjects 48% were correctly classified. The polygraph, on the other hand, produced these overall results: 10% inconclusive; 10% incorrect (four-fifths false negatives and one-fifth false positives); and 80% correct. Thus, in correctly identifying "guilty" subjects, the behavioral observations of the polygraphers were more accurate than the polygraph overall. (Id., pp. 66-67).

3. In 1981, Barland conducted one of the few validity studies ever done on the use of polygraphs in pre-employment screening. His subjects were military personnel who worked in the intelligence field. He told about half of them to lie on one of the relevant questions during the polygraph examination, and those examinees were each offered twenty dollars if they could appear truthful in the examination.

Depending on which of three methods of polygraph chart interpretation was used, these were the results:

For Truthful Subjects:
1) 15-23% incorrect
2) 04-19% inconclusive
3) 62-77% correct

For Deceptive Subjects:
1) 13-23% incorrect
2) 07-27% inconclusive
3) 50-80% correct
(Id., pp. 76-77).

In its 1983 report entitled "Scientific Validity of Polygraph Testing," the Congressional Office of Technology Assessment (O.T.A.) stated that: "The results of the Barland study raise serious questions about the usefulness of directed lie control questions in screening procedures as well as, in general, the validity of polygraph testing for pre-employment and counterintelligence purposes, especially if used alone." (Id., p. 77).

4. One of the most definitive laboratory studies of the reliability of "truth verification devices" was commissioned by

the U.S. Army Land Warfare Laboratory. This report, conducted by Dr. Joseph F. Kubis of Fordham University, was designated as classified material by the Army. But under pressure from former Congressman Froelich of Wisconsin, it was declassified and released to the public in 1974.

The results of the study are illuminating. The original group of subjects was divided in triads of three basic roles (Thief, Lookout, Innocent Suspect) in a simulated theft situation. The experienced polygraphers made incorrect evaluations 24% of the time. When other examiners rated the polygraph charts without having seen the subjects being tested, accuracy dropped to between 50 and 60%.

On the other hand, it is interesting to note how accurate the polygrapher' judgments were when made on the basis of simply observing subjects during questioning, without using the polygraph. When the original polygraph examiners were asked immediately after the test for an opinion, their personal judgments were right 65% of the time. This figure certainly warrants comparison with the 76% rating of fully "scientific" polygraph test results achieved by the experienced polygraphers using the polygraph; it suggests that the personnel manager using traditional interviews instead of the polygraph would hardly be at a disadvantage.

**Field Studies**

The first three field studies of polygraph validity examined here (Kleinmuntz and Szucko, 1982; Horvath, 1977; Barland and Raskin, 1976) share several characteristics. All three meet sound standards of scientific credibility. All three used criminal suspects. All three used reasonable criterion data to verify the polygraph results by using either subsequent confessions or the decisions of a panel of lawyers and judges. In all three of these studies the polygraph charts of the criminal suspects were independently re-scored by polygraphers who had not administered the original polygraph examinations. (Lykken, "Detecting Deception in 1984," p.13). Finally, the results of all three studies show it is truly innocent people who suffer the most at the hands of the polygraph.

1. In 1982 Kleinmuntz and Szucko obtained the charts of one-hundred polygraph examinations which had been conducted by the well known Reid Polygraph Agency in Chicago. Fifty of these charts had been verified as deceptive by the subsequent confessions of the examinees, and the remaining fifty had been verified as truthful by the subsequent confessions of other people. Polygraphers from the Reid agency then independently re-scored all one-hundred charts. The polygraphers incorrectly classified fully 39% of the verified innocent examinees as guilty. (Id., p. 16).

2. In 1977 Horvath published a polygraph validity study using fifty-six polygraph examination charts from the files of a police agency, all of which had been verified by subsequent confessions. Horvath had previously been the chief polygrapher for the Reid polygraph agency.

These polygraph charts were then re-scored independently by ten polygraphers. Of the innocent examinees only half (51%) were correctly scored as truthful. The overall accuracy obtained by the ten polygraphers was only 64%. (Id., p. 14). The innocent people would evidently have fared just as well had their "examiners" simply flipped a coin to determine their guilt or innocence, instead of using the polygraph.

3. In 1976 Barland and Raskin conducted a polygraph validity study as part of Barland's doctoral research. Barland administered polygraph examinations to ninety-two criminal suspects and Raskin then independently scored those charts. The

guilt or innocence of the suspects was verified by an expert panel of one judge, two defense lawyers and two prosecutors who examined each suspect's dossier.

Based on the decisions of the expert panel, Raskin incorrectly classified 55% of the innocent suspects as deceptive. Raskin's average, overall accuracy was only 72%. Interestingly, Raskin had to score over 20% of the polygraph charts as inconclusive, and even then the polygraph was correct less than half of the time for the innocent suspects. (Id., pp. 13-14). Given Raskin's results, it is clear those innocent suspects would have fared better with a simple flip of a coin.

4. In 1971 Horvath and Reid conducted a polygraph validity study which is widely quoted by supporters of the polygraph (Reid was the founder of the Reid College of the Detection of Deception in Chicago). Horvath and Reid selected the charts of seventy-five verified polygraph examinations from the files of Reid's polygraph agency. Forty of those charts were then re-scored independently by ten polygraphers. Thirty-five of the seventy-five polygraph charts were not re-scored, because they were either "uninterpretable by even the most skilled examiner," or "dramatically indicative of truth or deception." (Id., p. 11).

Among the ten polygraphers who re-scored the forty charts, seven were experienced examiners. Those seven polygraphers were able to re-score 91% of the charts correctly. However, one should note the figure of 91% correct was based on the re-scoring of a selected group of forty out of an original seventy-five charts. It would be a mistake to accept the results of this study as representative of the usual results obtained in the normal conduct of Reid's polygraph agency. (Id.).

As noted above, Kleinmuntz and Szucko (1982) also used polygraph charts from the Reid polygraph agency. Two reasons Kleinmuntz and Szucko's results (average accuracy of 73%) differed from Horvath and Reid's results (average accuracy 91%) are most likely because Kleinmuntz and Szucko's charts were selected by an independent investigator, and all of their charts were re-scored, instead of only a select number. (Id., pp. 16-17).

5. In 1981 Edwards, an employee of the Virginia State Crime Laboratory, conducted a polygraph validity study which involved mailing a questionnaire to all licensed polygraph examiners in Virginia, asking: a) How many polygraph tests did you administer in 1980?; b) how many of these tests were later verified to your satisfaction?; and c) how many of the verified tests were correct?

Forty-one (mostly police polygraphers) of Virginia's one-hundred and forty-seven licensed polygraphers answered the questionnaire. They reported having administered 2,620 tests in 1980, averaging eighty-five tests for each active polygrapher. That figure does not include the kind of tests administered to job applicants since only thirteen percent of the private polygraphers answered the questionnaire.

The polygraphers claimed to have verified forty percent of their tests, and on these tests they claimed to have been correct over 97% of the time. (Id., pp. 12-13). The methodology and results of this study prompted the following response from Dr. David Lykken of Minnesota:

> It seems supererogatory to criticize this alleged study in detail. One wonders what would happen if one were to send a similar questionnaire to all licensed astrologers in the state of Virginia asking how many predictions they had made during 1980, how many had been "verified", and how many of these had proved correct. (Id., p. 13).

The Congressional Office of Technology Assessment (O.T.A.) reviewed ten field studies of polygraph validity and found the results of these studies varied widely. O.T.A. summarized its findings as follows:

- false negatives (i.e., classifying a deceptive person as truthful) varied from 29.4% to 0%;
- false positives (i.e., classifying a truthful individual as deceptive) varied from 75% to 0%;
- inconclusive results varied from 0% to 25%;
- correct guilty detections varied from 70.6% to 98.6%;
- correct innocent detections varied from 12.5% to 94.1%.

(O.T.A. Study, p. 52).

In its November, 1983 publication, "Scientific Validity of Polygraph Testing," O.T.A. summarized its review of over thirty polygraph validity studies in charts which appear on pages 53, 63, and 64 of the O.T.A. study.

The significance of a 90%, 80%, or 70% polygraph validity rate cannot be fully understood unless one comprehends what that figure means to the individuals, particularly the innocent individuals, who are subjected to the polygraph examinations. For example, O.T.A. determined the mathematical chance of false positives (incorrectly classifying an innocent person as deceptive) is greatest when polygraphs are used to screen people. The reason for this, according to O.T.A., is that in most screening situations only a very small proportion of the screened individuals are guilty. Thus, according to O.T.A., if typically one out of a thousand people is guilty, and we assume the polygraph is 99% accurate (an extremely high accuracy level which even the staunchest polygraph supporter could not defend), then the law of probability would result in one guilty person being correctly identified as guilty, but ten innocent people would be wrongly classified as guilty. (Id., pp. 5-6). If an accuracy rating of less than 99% is assumed (a safe assumption given the studies reviewed above), the incorrect classification of innocent people as guilty increases substantially.

Another example illustrates the problem:

Assume that five percent of the people being screened are actually guilty. Also assume a very high validity rate of ninety percent. In this situation, the polygraph would only have a thirty-three percent predictive value, since for every person correctly identified as deceptive, two innocent people would be wrongly classified as guilty. It is a matter of simple mathematics that in order to catch ninety percent of the guilty individuals, sixty-eight percent of the people who fail the polygraph test will have been telling the truth. To lower the false positive rate (the percentage of innocents classified as guilty), one would have to allow more guilty individuals to escape undetected. But as more guilty people are cleared of suspicion so as to protect the innocent, the reasons for using the polygraph in the first place disappear. (See O.T.A. Study, pp. 98-99).

Given the results of studies demonstrating validity rates much lower than 90 percent (Horvath, 1977 = 64%; Kleinmuntz and Szucko, 1982 = 73%), the negative impact of polygraph screening on innocent and truthful subjects is in reality probably far greater than in the two hypotheticals above, and the consequences are all the more disturbing.

As discussed above in Chapter One, private employers use polygraphs extensively in screening situations, both to screen applicants for employment and to screen large numbers of employees during investigations of suspected employee theft. Yet it is in precisely these types of situations that the validity of the polygraph is lowest, and most damaging to innocent people. Even the F.B.I. does not believe large-scale screening is an appropriate use of the polygraph. The F.B.I. has regulations which prohibit the "use of the polygraph for dragnet-type screening of large numbers of suspects or as a substitute for logical investigation by conventional means." (F.B.I. Polygraph Regulation 13-22.2(2), 1980, as cited in O.T.A. Study, p. 99).

The risks which the inaccuracy of the polygraph pose to innocent and truthful workers are exacerbated by the bias of the polygraphers who work for private employers. Professor Lawrence Taylor of the Gonzaga University School of Law describes the bias problem:

> Polygraphists are motivated to serve their paying clients. Since clients have an interest in identifying guilty suspects, the polygraphers must expect to uncover cases of deception. Governmental agencies and corporations that want to ferret out security risks or dishonest persons in their organizations expect the polygraphist to identify such people. These firms often also retain polygraphists for employment screening and "periodic honesty checks," a lucrative source of income for many polygraphists.
>
> The source of the problem is that such agencies may be more troubled by false negative errors--that is, errors that occur because a polygraphist classifies a guilty or deceptive employee as innocent or truthful--than by false positive errors. From the vantage point of a bank or security agency, it is far better to err on the side of caution and perhaps even fire (or not hire) a trustworthy person than to run the risk of retaining a potential thief. . . .
>
> This motivation is unmistakably communicated to polygraph firms in the form of client loyalty and referrals. But it seriously comprises the polygraphist's objectivity and biases the findings against the nonpaying client, who is likely to be an individual with limited resources and is unlikely to have the power of a repeat player. (Taylor, pp. 243-44).

Thus, because of the inaccuracy of the polygraph itself and the potential bias of polygraphers, innocent and truthful people are more likely to be misjudged than are the truly guilty. In 1979 Waid and his associates conducted a study which showed that highly socialized people (that is, people who have highly developed moral standards and consciences) tend to fail polygraph examinations even though they tell the truth. Conversely, poorly socialized people are more likely to "pass" a polygraph examination whether they tell the truth or not. (Id., p. 17). According to Dr. Lykken:

> The irony is that by basing more and more important social decisions on the results of polygraph tests we may be producing an effect opposite to that intended, firing the most honorable police officers, refusing to hire the potentially most reliable employees, putting highly socialized citizens into unemployment lines or even in prison, while staffing our security agencies with the under-socialized . . . or with those clever enough to know how to beat the polygraph. (Id., p. 18).

Supporters of the polygraph argue that the polygraph works because lying causes conflict in a person's mind, which causes fear and anxiety, which in turn causes physiological changes detected by the polygraph. They are at least partly correct in that the polygraph can detect physiological changes. But there is no such thing as a "lying response." There is no physiological response specifically and exclusively associated with lying.

When a polygraph detects a change in a person's physiology, that change can mean any of three different things: 1) The person told the truth but one of many human emotions (grief, anger, embarrassment, fear, etc.) caused the physiological change; 2) a neurotic pre-condition caused the physiological change; or 3) the person lied. (Privacy, Polygraphs, and Employment, p.7). Many different factors and conditions can affect the outcome of a polygraph examination and cause an honest person to be labeled a liar, or cause a dishonest person to escape detection. Physiological abnormalities such as blood pressure problems, heart conditions, colds and headaches can affect the outcome of the examination. Fatigue, drugs, alcohol, and body movements can also affect the polygraph (Id.).

Yet, despite all the evidence of the serious limitations of polygraphs and the examiners who use them, over two million polygraph examinations are administered in the United States every year. Mathematical calculation of error rates and misclassification, applied on a national scale, translate into lost employment and lost employment opportunities numbering in the tens of thousands annually. Such high social and economic costs indicate that the prohibition of polygraph use in employment would be a sound national employment policy.

## IV. VOICE ANALYZERS

Though the polygraph may be the best known "lie detector," two other devices are becoming increasingly popular with employers seeking an inexpensive and uncomplicated way to test job applicants and employees. These devices are the Psychological Stress Evaluator (P.S.E.) and the Voice Stress Analyzer (V.S.A.). Both of these devices are used to detect lies by analyzing the human voice, but each analyzes different features of speech and they differ in design. (The Use of Polygraphs and Similar Devices by Federal Agencies, p. 6).

### The P.S.E.:

The Psychological Stress Evaluator (P.S.E.) was invented by two former army intelligence officers, Charles McQuiston and Allan Bell, who have marketed their device since 1970 through Dektor Counterintelligence and Security, Inc., in Springfield, Virginia. Like the polygraph, the P.S.E. is supposed to be able to detect a lie by measuring involuntary physiological changes which are associated with stress. The P.S.E. measures the audible and inaudible frequency modulations (or "microtremors") of the human voice, and displays the results on a graph. To make the device work, a tape-recording is made of a person's "yes" and "no" answers to a series of questions, and then a tape is played on the P.S.E. at one-quarter speed. If the P.S.E. detects microtremors in a person's voice, the machine's stylus will move erratically on the graph paper, supposedly showing that the person told the truth during questioning. If the P.S.E. does not detect any microtremors, then the stylus creates a tight pattern of vertical lines, supposedly showing that the person lied during questioning. The theory behind the P.S.E. is that lying causes stress, and stress causes an absence of microtremors in the human voice, which is detected by the P.S.E. (Id., pp. 5-6; and Jenkins, p. 55).

**The V.S.A.:**

The Voice Stress Analyzer (V.S.A.) was developed in 1970, at roughly the same time as the P.S.E.. The V.S.A. detects rapid variations in the vibrato or tremolo amplitude of speech, and electronically assigns numerical values to those variations. The V.S.A. then instantaneously displays a number supposedly indicating whether a person lied or told the truth. The inventors of the V.S.A. claim that the changes in vibrato voice amplitude vary with changes in levels of emotional stress associated with lying (The Use of Polygraphs and Similar Devices by Federal Agencies, p. 6).

Though the P.S.E. and the V.S.A. are designed differently and measure different qualities of speech, they are both "lie detectors" which are supposedly capable of detecting lies by analyzing the human voice. Voice analyzers have become increasingly popular as alternatives to the standard polygraph because they are compact, easy to operate, and can be surreptitiously administered without the subject's knowledge. Voice analyzers have few moving parts and they are wireless -- there are no electrodes, no rubber hoses for the chest and abdomen, and no blood pressure cuffs to attach to an examinee. Voice analyzers are thus very unobtrusive. During an interview or interrogation only a small microphone is visible, and even that can easily be hidden. Moreover, voice analyzers do not even have to be used during an interview. An interview can simply be tape-recorded (even over the telephone) and "analyzed" later by the voice analyzer (Id., p. 6; and Jenkins, p. 5).

The manufacturers of voice analyzers are well aware that their devices can be used unobtrusively and even covertly. A promotional pamphlet for a voice analyzer manufactured by the

Hagoth Corporation of Issaquah, Washington, states: "In a covert interrogation . . . by following a few simple rules you can unerringly spot a liar." ("Business Buys the Lie Detector," p. 104). Charles Glazerman of Dektor believes that "The beauty of the PSE as opposed to the polygraph is that there is no artificial stress being induced." (Id., p. 104). Apparently Mr. Glazerman believes that his "lie detector" works better if a person is unaware that he or she is being examined. Even if voice analyzer manufacturers do not recommend using their products covertly, the very design of voice analyzers makes it easy to use them covertly. For example, C.C.S. Communication Control, Inc., of New York City, sells a pocket-size voice analyzer. In an advertisement for its miniature "lie detector," CCS states: "Voice Stress Analyzer. This is the same high quality system used by professionals to detect truth from deception . . . but it is ultra miniaturized to carry in a pocket. To find if your employees are stealing . . . if your business associates are cheating . . . if your friends are really your friends . . . carry the Mini VSA wherever you go." (Advertisement in the New York Times, September 11, 1983).

## Accuracy

J.W. Heisse, Jr., the president of an association of voice stress analysts, claims that the P.S.E. is 96% accurate. Mr. Heisse bases his claim on a study of fifty-two verified P.S.E. charts selected (twenty-seven of them by Mr. Heisse) for blind re-scoring by twelve P.S.E. examiners. Five re-scorings were reported for each chart. (Lykken, "Detecting Deception in 1984," pp. 9-10) This study prompted the following observations by Dr. David Lykken of the University of Minnesota:

> The faults of this study are legion. First, the "verification" of the tested person's actual guilt or innocence was essentially left to the original examiner's opinion. Secondly, if all of the re-scorers actually re-scored all of the charts, as should have been done, then more than half of these re-scorings are

> inexplicably left out of account. Third, and fatal to the entire enterprise, the original charts to be re-scored in this study of P.S.E. "validity" were selected first by the original examiners themselves and then apparently selected again by Heisse. If a professional P.S.E. examiner is invited to submit for formal re-scoring verified charts from his collection, can we really suppose that he will offer charts that he scored incorrectly in the first instance? (Id., p. 10).

Dr. Lykken adds that studies of P.S.E. accuracy by researchers who have no personal or professional stake in the results of their studies, and who use randomly selected P.S.E. charts, "have consistently found that pairs of trained 'analysts' cannot agree in their scoring of a truly unselected run of charts at much above chance levels." (Id., pp. 10-11).

One of the most definitive studies of "truth verification" devices, commissioned by the U.S. Army Land Warfare Laboratory and conducted by Dr. Joseph F. Kubis of Fordham University, examined the validity of voice analysis and polygraphs (see Part III of this document for a discussion of the study's results on polygraph validity). Dr. Kubis first set up a simulated theft and divided the original group of subjects into triads of three basic roles: thief, lookout, and innocent suspect.

The subjects were then administered P.S.E. examinations. Since three subjects were involved in the mock theft, the statistical chances of correctly identifying a subject as "guilty" or "innocent," based purely on chance, were obviously one out of three, or 33%. When the P.S.E. was used to individually determine each subjects' status, the P.S.E. was correct only 32% of the time -- less than simple chance. When the three members of each triad were examined together, the P.S.E. was correct only 53% of the time. However, when the examiners determined a subject's "guilt" or "innocence" by simply observing the subject's behavior, the examiners were correct 65% of the time!

The results of scientific studies of voice analyzer accuracy should alarm and dismay any person subjected to such a test at work or as part of a hiring procedure. For in addition to the limitations of the machines, one must also consider the limitations of the people who use them. For example, Dektor (manufacturers of P.S.E.'s) gives the purchasers of its machines a five day course on how to use the device. (Jenkins, p. 55). If a voice analyzer can be less accurate than pure chance even under laboratory conditions, one can only speculate as to the validity of such devices in the hands of employers anxious to "catch" employees or job applicants by using these "lie detectors," covertly or otherwise. Why do employers use these devices? Perhaps Richard H. Bennett Jr., President of Hagoth Corporation (producers of voice analyzers) explained the true appeal of these "lie detectors" when he said: "This product appeals to the desire to buy a terrific toy." ("Business Buys The Lie Detector," p. 104).

Again, thank you, Mr. Chairman, for holding these important hearings on one of today's fastest growing forms of employee intimidation. I urge prompt action by the Committee on S. 1815, and expeditious passage by the Senate. Only when Congress summarily proscribes lie detectors from the workplace will workers regain the dignity and self-respect they deserve.

## BIBLIOGRAPHY
## and Suggested Reading

Ansley, N., Quick Reference Guide to Polygraph Admissibility, Licensing Laws, and Limiting Laws (Severna Park, Md.: American Polygraph Association, 1983).

Barland, G.H., "A Validation and Reliability Study of the Counterintelligence Screening Test," unpublished manuscript, Security Support Battalion, Military Intelligence Group, U.S. Army, Fort George Meade, Md., 1981.

Barland, G.H., and Raskin, D.C., "An Evaluation of Field Techniques in Detection of Deception," Psychophysiology 12:321-330, 1975.

Barland, G.H. and Raskin, D.C., "Validity and Reliability of Polygraph Examinations of Criminal Suspects," report No. 76-1, contract No. 75-N1-99-0001 (Washington, D.C.: National Institute of Justice, Department of Justice, 1976).

Belt, J.A., and Holden, P.B., "Polygraph Usage Among Major U.S. Corporations," Personnel Journal, 80-86, February, 1978.

"Business Buys The Lie Detector," Business Week, 100-104, February 6, 1978.

Clark, J.P., and Hollinger, R.C., Theft By Employees In Work Organizations, Executive Summary (U.S. Department of Justice, National Institute of Justice) July, 1982.

Coghill, M.A., The Lie Detector In Employment: An Examination of Some of the Problems, with additions by Elaine F. Gruenfeld, Key Issues Series No. 2 (Ithaca, N.Y.: New York State School of Industrial and Labor Relations, Cornell University, Rev. 1973).

Edwards, R.H., A Survey: Reliability of Polygraph Examinations Conducted by Virginia Polygraph Examiners, report for the Commonwealth of Virginia (Richmond, Va.: Bureau of Forensic Science, Department of General Services, 1981).

Federal Polygraph Limitation and Anti-Censorship Act of 1984, Hearings before the Subcommittee On Civil Service of the Committee On Post Office and Civil Service, House of Representatives, on H.R. 4681, February 29, 1984.

Food and Beverage Trades Department (F.B.T.D.), AFL-CIO, Rein of Terror: The Lie Detector and Psychological Management in the Workplace, 1978.

Hiatt, F., "Pentagon Begins Wider Use of Lie-Detector Examination, Washington Post, A 1 and A II, Jan. 4, 1985.

Horvath, F.S., "Detecting Deception in Eyewitness Cases: Problems and Prospects in the Use of the Polygraph," Advances in the Psychology of Eyewitness Testimony, J. Wells and B. Loftus (eds.) (New York: Cambridge University Press), in press.

Horvath, F.S., "The Effect of Selected Variables on Interpretation of Polygraph Records," Journal of Applied Psychology 62:127-136, 1977.

Horvath, F.S., and Reid, J.E., "The Reliability of Polygraph Examiner Diagnosis of Truth and Deception, The Journal of Criminology and Police Science, 62:276-281, 1971.

Jenkins, J.A., "Business' Little Black Box," TWA Ambassador, 53-91, June, 1979.

Kleinmuntz, B., and Szucko, B., "On the Fallibility of Lie Detection," Law and Society Review 17:84-104, 1982.

Kubis, J.F., "Comparison of Voice Analysis and Polygraph as Lie Detection Procedures," Technical Report No. LWL-CR-03B70, by Joseph F. Kubis, Fordham University, to U.S. Army Land Warfare Laboratory, Aberdeen Proving Ground, Md., 20015--(Final Report Contract No. DAAD05-72-C-0217).

Lykken, D.T., A Tremor In The Blood: Uses and Abuses of The Lie Detector (New York, McGraw-Hill, 1981).

Lykken, D.T., "Detecting Deception In 1984," American Behavioral Scientist 27: 481-499, 1984.

Maritime Trades Department, AFL-CIO, The 'Lie Detector': Guilty Until 'Proven' Innocent, Invasion of Privacy in America No. 1, 1970.

National Directory of Private Investigators, Process Servers, Court Reporters, Repossessers, Polygraph Examiners (Las Vegas, Nev.: Central Directory and Information, 1982).

Office of Technology Assessment, Congress of the United States, Scientific Validity of Polygraph Testing: A Research Review and Evaluation, A Technical Memorandum, November, 1983.

Podlesny, J.A., and Raskin, D.C., "Effectiveness of Techniques and Physiological Measures in the Detection of Deception," Psychophysiology 15: 344-358, 1978.

Polygraph Control and Civil Liberties Protection Act, Hearings Before The Subcommittee On the Constitution of the Committee On The Judiciary, United States Senate, on S. 1845, November 15 and 16, 1977, and September 19 and 21, 1978 (U.S. Government Printing Office, Stock Number 052-070-0004772-1).

Pressures In Today's Workplace, Report of the Subcommittee on Labor-Management Relations of the Committee On Education and Labor, United States House of Representatives, December, 1980.

Privacy, Polygraphs, and Employment, A Study Prepared By the Staff of the Subcommittee on Constitutional Rights of the Committee On The Judiciary, United States Senate, November, 1974.

Taylor, L., Scientific Interrogation: Hypnosis, Polygraphy, Narcoanalysis, Voice Stress and Pupillometrics (Charlottesville, Va.: Michie Co., 1984).

The Use of Polygraphs and Similar Devices By Federal Agencies, Thirteenth Report of the Committee On Government Operations together with Separate and Dissenting Views, January, 1976.

Waid, W.M., Orne, M.T., and Wilson, S.K., "Effects of Level of Socialization on Electrodermal Detection of Deception," Psychophysiology 16:15-22, 1979.

Waid, W.M., Orne, M.T., and Wilson, S.K., "Socialization, Awareness and the Electrodermal Response of Deception and Self-Disclosure," Journal of Abnormal Psychology 88:663-666, 1979.

Responses to Senator Quayle's questions:

Questions 1, 2 & 3.

The UFCW does not believe that the Federal Government should regulate hiring and firing in all instances. However, we do believe that when there is significant evidence that state laws are being circumvented or are not being enforced, then the Federal Government should step in and bring some uniformity to the situation. This federal participation into employment related areas is not unusual, i.e. National Labor Relations Act, Civil Rights, Minimum Wage, Equal Pay, Child Labor Laws, just to mention a few examples.

Question 4.

No. We believe the real question is whether employers should be allowed to continue to intimidate and abuse workers with a device from which our society protects even criminal suspects.

Question 5.

No.

Question 6.

They should not.

Question 7.

We do not believe they should.

Question 8.

They should not.

Question 9.

We would point out that the Federal Government has already acted to protect workers who refuse to work with hazardous substances. Moreover, the Federal Government has acted in the area of wage garnishment or assignment with regard to child support payments.

The other catagories you mentioned should be regulated when it is demonstrated that state laws are either inadaquate or being circumvented.

QUESTIONS BY SENATOR DAN QUAYLE FOR WITNESSES
HEARING BEFORE THE LABOR AND HUMAN RESOURCES COMMITTEE
UNITED STATES SENATE
APRIL 23, 1986
ON S. 1815

1. When should the federal government regulate hiring and firing?

2. When should the regulation of hiring and firing be left to the states?

3. Why should the federal government prohibit polygraphs?

4. Isn't the real question improper use of polygraphs and not that they are all bad?

5. Do you favor the exemptive approach to the use of polygraphs?

6. Why should exemptions be permitted for some industries and businesses and not others?

7. If polygraphs are "all bad" why should the Department of Defense be permitted to use them? Why should intelligence and counterintelligence agencies of the federal government be permitted to use polygraphs if they are unreliable?

8. If polygraphs are so unreliable, why should day care centers and nursing homes be permitted to use them?

9. The states currently regulate whether employees can be fired or not hired for:

refusing to work with a hazardous substance;

refusing to be sterilized;

for being a volunteer fireman;

filing a workman's compensation claim;

being a whistleblower;

wage garnishment or assignment;

receiving a summons to do jury duty;

having AIDS;

refusing to contribute to a group health policy;

refusing a drug or alcohol test;

I would like the witnesses to comment on each of these categories and whether they believe there should be federal regulation of each one.

The **Chairman**. I want to thank you, Ms. Braxton, for being here. It has taken a lot of courage for you to come and tell your story, and I know it has been difficult for you to do. I just want to tell you how much we appreciate your willingness to participate. Let me just ask you one question, and it will not be too difficult.

What was the reaction of your fellow employees there at the pottery factory or plant when they heard that you had been fired for this reason?

Ms. **Braxton**. My fellow employees were very shocked to know that I was the one that had to be fired because of the lie detector test, because they all respected me, and they always said, "Mary, you do not steal." And when I was the one who was fired, they were real shocked about it. And most of them said they stole, but they did not get caught.

The **Chairman**. I see.

Now, Mr. Wynn, let me turn to you. We have frequently heard justifications for employer use of polygraphs to avoid the hiring of habitual or chronic drug users, and in certain industries, that really is extremely important. I have to admit, I have been amazed at some of the business people who come in to see me and how widespread hard drug use is in this country, let alone marijuana. They just say that is so widespread, a lot of them do not even pay any attention to that, but the hard drug use is pretty bad, according to them.

Now, as I am sure you know, President Wynn, drug use in the work force is rapidly becoming an epidemic in the eyes of many people. Are there measures that your union would endorse other than polygraph examinations that might help the employer to be able to get on top of what really is a serious problem and becoming even more serious in this country?

Mr. **Wynn**. Well, first off, Senator, my organization is opposed to use of drugs by one of our members because of the effect it has not only on that worker, but their coworkers, as well as the business that they might be working for and the consumers that they might be dealing with.

We have tried to deal with it in a variety of ways. First, we think that most of our employers have good employment practices, and do good investigative work in an attempt to make sound determinations about the people they are attempting to hire.

There could be situations beyond that where an applicant might fall through all the employers nets. As an organization, we have attempted to work with our employers when it is determined that one of their workers and one of our members has a drug or alcohol problem and we have attempted, and many of our local unions throughout this country in conjunction with management, have developed rehabilitative programs where we can rehabilitate the worker and make him a more productive worker. We think that is a far more sensible way to deal with the problem. Hopefully then we can cure the problem, and return the worker back to the workplace and make him a productive worker. In the event that that does not occur, then of course that member or worker unfortunately has to be discharged.

The **Chairman**. All right. I am sure you know that a significant portion of the employer community feels that its ability to give polygraph examinations is critical to preventing and detecting actual employee theft. Now, if you were an employer what steps would you take to combat employee theft, other than the polygraph?

Mr. Wynn. Good business procedures. As an example, 800,000 of our members work in grocery stores. I will give you two of the largest employers—Safeway and Kroger. Between Safeway and Kroger, they employ approximately 223,000 members of my union. Approximately 30 percent, I would assume, work on cash registers. Those two employers in the course of a year take in $35 billion in this country, most of which is cash. There are some checks. Our members handle that money and handle it very prudently. I would point out to you that in the course of a year—and the polygraph is prohibited in our collective bargaining agreements with those companies as it is with probably 90 percent of the employers we have under contract—they handle that $35 billion in cash, which as we all know could be desirable to certain people. They handle that $35 billion in cash without the supposed deterrent of polygraph test. They handle that money, and there is an extremely minor factor—I do not have the data to prove this—but there are very few people in our stores who steal the employers' money. And I think it is because we have very good employees and very good members; I think further that management has very good practices and very good procedures for following that money and to make sure that that money is properly handled.

The Chairman. Let me just ask one other question. As you know, there is an interest in replacing this bill's blanket prohibition against polygraphing with a State regulatory scheme that would standardize the examination process, would limit the type of questions that could be asked, and of course, would license the examiners.

Do you feel that such a State regulatory scheme might be all right, or might adequately protect the applicants and employees from polygraph abuse?

Mr. Wynn. What I am fearful of, Mr. Chairman, is that it is possible that such State statutes might appear to condone the process of polygraph testing, and not achieve what I think that you are attempting to achieve in this committee and that we attempted to achieve in the House in the previous vote. I believe that workers' rights, which are predominantly regulated by Federal law, should be regulated by Federal law in polygraph testing.

The Chairman. Thank you.

Senator Simon, we will turn to you.

Senator Simon. Thank you, Mr. Chairman, and I am sorry I was not here to hear your testimony; I was involved in another hearing.

Mr. Wynn, you mentioned your contract with Safeway and Kroger. Is this a major point of contention to you? Do Safeway and Kroger think they would be strengthened appreciably if they did not have this as part of their contract?

Mr. Wynn. I am sorry, Senator, but I do not follow the question.

Senator Simon. When you enter into negotiations with Safeway or Kroger, do they make a big thing—is whether or not you have polygraph tests a major point of contention in your contract?

Mr. WYNN. It is prohibited. Our members are not permitted to take polygraph tests. And I would venture to say that in 90 percent of our contracts that is the case. They are not permitted to take polygraphs. Even as an example, if one of our members would agree or suggest that they take a polygraph test, they are not permitted.

The point that I was attempting to make as I talked about Safeway and Kroger is that we have 30,000, 40,000, maybe 50,000 people—or maybe the number is 80,000 people—who are handling $35 billion in the course of a year, and there is no threat of the possibility of them being able to even take a polygraph test. And yet, because of the procedures that exist, the company procedures, good management of the money—there are some shortages, and there is some stealing, and there are some people fired because of it—but they are a very minor fraction in contrast to the number of people that handle the money.

Senator SIMON. But when you sit down to negotiate with Safeway or Kroger, is this a major item for them?

Mr. WYNN. No; it is not. In fact, we have probably negotiated the abolishment of polygraph testing in our stores, I would assume in the midsixties, maybe even before that. To my knowledge—and you must understand, we have 22,000 contracts throughout the United States and Canada, and I attend very few negotiations, if any—but to my knowledge, I do not know of any proposal on the part of management to abolish that language in the contract.

Senator SIMON. Thank you.

Ms. Braxton, after the court found the examiner had not treated you fairly, did the Virginia board that supervises the polygraph examiners, did they take any action against the examiner?

Ms. BRAXTON. Do you mean, did we go to court against the examiner?

Senator SIMON. Yes.

Ms. BRAXTON. Yes; we did. We went to court, and we had a judgment against the examiner himself and his company. The judgment was $21,000, but I never got it.

Senator SIMON. But there is a board—and I do not know anything about the laws of Virginia—but there must be a board that supervises polygraph examiners in Virginia. Did that board do anything to——

The CHAIRMAN. Ms. McKenna, why don't we have you answer that question, since you are the attorney for Ms. Braxton.

Ms. MCKENNA. After the judgment was awarded, and there was some publicity about the case, the regulatory board made an inquiry, but by that time the examiner had fled, so I do not believe any action was ever taken against him.

Senator SIMON. That regulatory board, you say, made an inquiry. Have they taken any action?

Ms. MCKENNA. Not to my knowledge.

Senator SIMON. Not to your knowledge. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Simon.

I want to thank both of you and the people accompanying you for being with us today. I think you have added a lot. We will put your full statement in the record—it is an excellent statement, Bill, and we appreciate the efforts you have put forth in putting that together.

Mr. **Wynn**. Thank you, Senator.

The **Chairman**. Thanks a lot.

Our next witness is Mr. F. Lee Bailey. Mr. Bailey is a well-known trial attorney, television host, and staunch advocate of the accuracy in use of polygraph testing.

So we are very pleased to have you with us, Mr. Bailey, and we look forward to taking your testimony at this time. We will turn the time over to you.

## STATEMENT OF F. LEE BAILEY, ATTORNEY AND POLYGRAPH ADVOCATE, BOSTON, MA

Mr. **Bailey**. Thank you very much, Mr. Chairman.

My background is somewhat unusual. I began working with the polygraph in trying lawsuits in the Marine Corps in 1954. My training was that it was very important not to try innocent people in the military, because the morale would fall very sharply if it were thought that one could be innocently accused and get caught up in a court-martial. Indeed, the Uniform Code of Military Justice is structured with elaborate pretrial procedures to screen out the innocent.

After I left the Marine Corps and went to law school and began to try lawsuits, I found a different environment. For political reasons, high-visibility targets would often be hauled into court because of the headline value to the prosecutor, with much less concern about ground truth.

I also found out that the courts did not promise truthful people that they would be left alone or at least vindicated. They promised only what was called a fair trial. And the obligation of an American citizen who was accused of a crime he never committed, if he had his fair trial, was to serve a prison sentence which made a mockery of the entire system. And that is the rule today.

I therefore sought a greater undertaking. In my view, a criminal defense lawyer has an obligation to see that one who is guilty gets a fair trial and works the system without any fraud whatsoever upon it, with no false testimony produced by the defense. But one who has an innocent client has an obligation, whether it be ethical or moral or legal, to see by any means lawful that that person is not punished for a crime he did not commit.

I found that the most useful tool to tell me as a lawyer in the confidence of the attorney-client privilege which I had to know to take on that higher obligation was the polygraph, then in a much more rudimentary stage than today, with no licensing in any State, with no national association and no standards—but still, certain skilled people who were very dependable.

In 32 years of working with the polygraph, it has let me down one time. We asked the wrong question because our case information was bad and did not get a response when we should have.

Senators, I have testified for the prosecution and the defense in courts, both State and Federal, as an expert witness on this technique. I have heard a great deal of rhetoric today, and I wish to be very blunt with you.

While I believe that this bill is well intentioned, and I certainly believe in the integrity of every person on this panel in trying to do a job in fairness to the worker and the other people perceived to be victimized, I must suggest to you most respectfully—and I take no position whatsoever on preemployment screening; that is not my expertise; my expertise lies in specific polygraph tests to find out only one thing which that instrument cannot tell me, but which I can discern by reading its charts, and any skilled examiner can discern. And by my reading the charts—because, although one of the Senators this morning seems to be unaware of it—these can be read blind. The subjectivity has been removed, and the chief proponent of that blind scoring is the Federal Bureau of Investigation which adopted the technique.

Now, I know of no other active trial lawyer who has ever qualified as an expert or been on the faculty of two of the three leading polygraph schools that existed in the early sixties when I started. I have had a very successful practice for principally one reason—I always know something the prosecution frequently does not, and that is whether or not I have a case for aggressive presentation of a defense case, or I have a case where I should attempt to offer my client his legal right to hide behind a reasonable doubt because he cannot afford the scrutiny of the spotlight.

I have lost more cases for innocent people in front of juries than I have won for guilty ones. I have a very high percentage of people who come to me because they know of my alignment to the polygraph and they desperately need its help.

In 1962, I tried to persuade the Commonwealth of Massachusetts to admit the polygraph. They said it was not ready. But in 1973, they did admit it, and it is admissible today. If you are accused of a crime, you may demand a court-appointed examiner, and either side may call him if and only if the defendant seeks to testify. That system has worked very well.

There has been a lot of talk about reliability. I find this highly disturbing. The Government of the United States speaks with forked tongue. The Government bet this entire country on a single polygraph test in 1981, when the entire Titan missile system was compromised by a man, later my client, who took the codes to the Russian Embassy. And only after a polygraph test as to which codes he took could the Strategic Air Command test those codes. You will find that documented in *Cook* v. *Orser,* Court of Military Appeals, 1982.

Paul Minor, the head of quality control for the FBI, told a panel of judges that I was addressing as well in Reno School for Judges: "We never prosecute those who pass our test." I ask you why, if they are unreliable?

Robert Bryzantine, who stands behind me, I notice, Chief Examiner for the U.S. Army, testified in *The United States* v. *Ernest Medina,* the captain of Mylai-4. Captain Medina is the first person who has ever passed an Army polygraph test in which I have been involved, and that includes 50,000, who has ever been prosecuted. I ask you why.

Properly run, in good hands, this is a highly reliable test in some kinds of cases. But you are throwing the baby out with the bath water. If you want to target preemployment screening, fine; do not wipe every good examiner out of the private sector at the same time and identify certain industries to which the thieves can flock because they did not get the benefit of your exception, and they know they are immune from testing.

I want both of you to know that I could collect $10 million in cash tomorrow if, No. 1, I were of a treasonous mind, and No. 2, I could give the Russians the secret of beating a good polygraph examiner. I am not treasonous, and I do not know that secret. I cannot beat Mr. Bryzantine, and he cannot beat Mr. Gelb who, 120 times with me, challenged the American public to send forth those who could beat the machine, and 125 times, we succeeded in turning them back. It never happened on national television.

Now, anyone who calls that a gadget, or says "the machine makes mistakes", is simply indicating his ignorance. That machine either works, or it is broken. It is a simple medical instrument. The examiner is like a doctor. That is like a scalpel. In his hands, it can be extremely useful. In anybody else's hands, it is either worthless or dangerous.

If you are going to regulate federally the polygraph exam, upgrade them, bond them, put sanctions on them, make it a crime to ever abuse the privilege, the high privilege, of being an examiner—and bear in mind, they can never refuse to take a test if charged, and they do not know how to beat this test, either. But do not knock them out of the ballpark, because you will take from me the ability to go anywhere outside the Government and find an examiner good enough so the Government will not stand up to them with a spurious case.

Consider Senator Robert Glass. The Government indicted him in Alabama. He asked for a polygraph test. The FBI and the U.S. attorney said, "Not for you, not for you." He came on our show. We passed him. The Government witnesses admitted they were lying. The Government dismissed the charge on the grounds that their whole case was false, and they broke him in the process; every dime he had went into a legal proceeding that never should have been started. I had the power to help him do that only because I had the availability of someone like Edward Gelb, who very frankly, does not make mistakes any more than Mr. Bryzantine. Nor is anyone in this room in a position to step forward and accept a 20-year-old offer. I will give $25,000 to anyone who can beat a top-flight examiner.

I leave that offer before you, and I would be happy to answer any questions. But I speak strictly for individuals. I am not a Democrat or a Republican. I defend those who are out of power because they get indicted. I am not union, and I am not management, although my lapel pin is one of the most visible unions in the country; at the moment, I work for them. But I do stand for innocent people who deserve something more out of the system than the ceremony of a fair trial. They deserve to be kept out of the system entirely. These are the people who will most effectively help us do that.

[Response of Mr. Bailey to questions submitted by Senator Quayle follow:]

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OF COUNSEL
F. LEE BAILEY

May 12, 1986

Senator Orrin G. Hatch
Senate Committee on
Labor and Human Resources
428 Dirksen Senate Office Bldg
Washington, DC 20510

Dear Senator Hatch:

Thank you for your letter of April 30, 1986, and thank you again for the opportunity to appear before your committee.

I enclose answers to the questions propounded by Senator Quayle. I have reviewed the transcript of my testimony, and I have found no errors of substance.

Very truly yours,

F. Lee Bailey

FLB/clc
enc.

ANSWERS BY F. LEE BAILEY
TO QUESTIONS BY SENATOR DAN QUAYLE
FOR WITNESSES BEFORE THE LABOR AND HUMAN RESOURCES COMMITTEE
UNITED STATES SENATE
S. 1815

MAY 12, 1986

*NOTE: These answers are matched to Senator Quayle's list of April 23, 1986, as sent to me by Senator Hatch.

1. Only when there is some sort of legitimate federal nexus, such as federal contracts being performed, federal funds being used, federally sensitive (defense-related) work being done, etc.

2. In all cases of employment where there is no legitimate federal interest, subject only to such regulation meeting minimal standards under the U.S. Constitution, for which judicial remedies exist.

3. It would be a great embarrasment to the United States if congress were to outlaw a technique that has been in use since 1923, has brought great benefits both to law enforcement at all levels and innocent individuals accused of crime, is in substantial use and relied upon in Japan and Israel, and is literally a cornerstone of national security in countless U.S. agencies of the most sensitive nature. Many states, starting with Massachusetts in the late 1950's, have barred the use of polygraphs by employers as a condition of employment or continued employment. Employees who requested such tests to avoid being under a cloud of suspicion were allowed to take them, so long as their request to the polygraph examiner was in writing. If the proposed legislation becomes law (S. 1815) the private sector will soon have no polygraph examiners; those that remain in the profession will have to work for the government. This is a very frightening prospect, since the polygraph, like the news media, has proven an effective technique to prevent a given administration from prosecuting political adversaries who are innocent.

4. It is indeed. Although opponents can always surface some scare stories about any profession, such occasions (especially when dealing with specific tests involving accusations of crime) are rare. Twenty-six states now have licensing for polygraph examiners, and the rest should have. I would favor the creation of a federal license available to polygraph examiners (just as many lawyers are separately licensed in both state and federal courts; but a federal ban is indeed throwing the baby out with the bathwater.

5. No exemptive system is going to yield anything but lawsuits

and chaos, calling into question the equal protection clause of the Fourteenth Amendment.

6. They should not. Any logical basis of discrimination is going to be very hard to fashion, will be vulnerable to the accusation that some lobbies are stronger than others, and will have difficulty surviving close scrutiny by the courts.

7. A very good question which no qualified witness has sought to answer directly; bear in mind, such use is not limited to defense and intelligence agencies. The FBI makes extensive use of the polygraph, and places great reliance upon it. At the Judicial College in Reno, Nevada last July I apppeared on a panel discussing polygraph for the benefit of the newly appointed judges at the school. In response to a question, Mr. Paul Miner, chief of the FBI's quality control program, told the judges that "if a suspect passes our polygraph test, we don't prosecute."

8. They shouldn't. But if polygraphs were inherently unreliable, their use would have died long ago.

9. I see no reason for the federal government to regulate hiring or firing for any of the categories listed.

F. LEE BAILEY

# QUESTIONS BY SENATOR DAN QUAYLE FOR WITNESSES
# HEARING BEFORE THE LABOR AND HUMAN RESOURCES COMMITTEE
# UNITED STATES SENATE
# APRIL 23, 1986
# ON S. 1815

1. When should the federal government regulate hiring and firing?

2. When should the regulation of hiring and firing be left to the states?

3. Why should the federal government prohibit polygraphs?

4. Isn´t the real question improper use of polygraphs and not that they are all bad?

5. Do you favor the exemptive approach to the use of polygraphs?

6. Why should exemptions be permitted for some industries and businesses and not others?

7. If polygraphs are "all bad" why should the Department of Defense be permitted to use them? Why should intelligence and counterintelligence agencies of the federal government be permitted to use polygraphs if they are unreliable?

8. If polygraphs are so unreliable, why should day care centers and nursing homes be permitted to use them?

9. The states currently regulate whether employees can be fired or not hired for:

refusing to work with a hazardous substance;

refusing to be sterilized;

for being a volunteer fireman;

filing a workman´s compensation claim;

being a whistleblower;

wage garnishment or assignment;

receiving a summons to do jury duty;

having AIDS;

refusing to contribute to a group health policy;

refusing a drug or alcohol test;

I would like the witnesses to comment on each of these categories and whether they believe there should be federal regulation of each one.

The CHAIRMAN. Well, thank you, Mr. Bailey.

In your introduction to the book, "Lie Detector Man", you describe a series of elements which really must be prevalent in order to have a meaningful test, to even be possible—elements such as "strength of issue" and "distinctiveness of issue". In addition, you indicate that the examiner will collect case information from the person being examined, and that this is a process which may take an hour or even several hours in the process——

Mr. BAILEY. Yes.

The CHAIRMAN [continuing]. That he will not ask surprise questions, as a general rule.

Now, do you feel that the typical polygraph examination or test being given today, especially in the workplace, which many will testify is 5 to 15 minutes long, is satisfying those requirements?

Mr. BAILEY. That is not a polygraph test, Senator. That is a misnomer.

The CHAIRMAN. I agree. I agree with that.

Mr. BAILEY. A polygraph test is a test of a specific accusation where some facts are known; ground truth may eventually be discovered. That is not a polygraph test. It is a different phenomenon. I neither support it nor oppose it, and I do not have much experience with it.

The CHAIRMAN. Well, let me just ask it a little differently. In the Georgia State law, which is often cited as a model regulatory statute, an examiner can give a polygraph examination every one-half hour. Do you think that is a fair way of testing whether a person should have the right or not have the right to be employed in the private sector?

Mr. BAILEY. No, sir, not if that is all they rely upon, because the questions tend to be shotgun, and they could easily provoke responses without knowing what the truth was.

The CHAIRMAN. Sure.

Mr. BAILEY. However, once again, I insist that what I am defending takes a minimum of 3 to 4 hours to accomplish, and that is a complete, responsible, expert polygraph test.

The CHAIRMAN. Now, I agree with you. I have no difficulties with that. I have a great deal of faith and confidence that if you meet those three or four requirements of a top examiner, administering it over a number of hours, asking limited questions that are well thought out in advance, and of course, an examiner, or at least whoever makes the analysis, who is an expert analyst in the process. But you see, what is being complained about, is that we are having very short tests with all kinds of questions, some of which are not fair, some of which have no real basis to be asked with regard to a person's employment record or employment history, or even employment right, and given over a very short period of time. These are some of the problems that have arisen in this particular fight over this particular bill.

Mr. BAILEY. If that were the only group of users to be affected, I doubt that I would have come here today. As I read the bill, the possibility is great that effectively, although unintentionally, the Senate will cause the Government to own all of the examiners, and that is almost as bad as letting the Government screen the press.

The CHAIRMAN. Thank you.

Senator Simon, we will turn to you.

Senator SIMON. First of all, you used a phrase that I am not familiar with. You talked about "blind scoring."

Mr. BAILEY. Yes, sir.

Senator SIMON. What does that mean?

Mr. BAILEY. Very simply, the technique of numerical scoring, in order to eliminate the subjectivity an examiner might bring to it, has enabled the field examiner to score his polygraph charts and then, in the case of the FBI in particular—and it is used in other quadrants—to send them to the home office, where Mr. Minor heads up the quality control section, without knowing which questions were asked, but only which was relevant and which was a control—without even knowing the crime being investigated. They are rescored to see whether they come out plus or minus within the acceptable range. That is a second check. I could "blind score" an exam that Mr. Gelb and Mr. Bryzantine had conducted more than a week ago, without any more information than the numbers assigned to the questions which are either control questions or relevant questions, to see which provoked the greater response. And that is the technique of blind scoring.

Within 3 or 4 years, Senator, IBM personal computers will do the blind scoring, and a little more human error and body English will come out of it. But normally, the blind scoring by a good field examiner is echoed by the quality control examiner who does not know what blind score has already been assigned, what the original score was.

Senator SIMON. Now, I agree that the polygraph can be used very effectively to protect the innocent. In fact, on one occasion I recommended to someone—and I am not an attorney—but someone came to me, a friend of someone who had been indicted for murder. I recommended that that person—I said, "If your friend is really innocent, ask for a polygraph test; if he is not innocent, do not ask for a polygraph test. And he did, and the charges were dropped.

The question here really is, is it desirable in our society to go in a massive way to the use of polygraph testing? And I would be interested in your observations there.

Mr. BAILEY. Well, unfortunately, there are several answers, and the subject is controversial. If you are talking about testing an employee because you know that one in five took money, and you would like to save the four instead of firing them all, then I say yes, it belongs in that place.

If you are talking simply about preemployment screening, it can yield valuable information in the hands of a very highly ethical examiner who does not ask questions about your sex life. It is subject to abuse, but I believe the remedy for abuse is to go after the abusers and not kill the profession.

If the Virginia statute had caused the examiner to be bonded, Ms. Braxton would have collected her judgment. They did not think of that. Many privileges are exercised with assurance that you will answer for abuses. We lawyers can do the same thing.

There are a lot more abusive lawyers in this country than there are abusive polygraph examiners, percentagewise and otherwise. [Laughter.]

Senator SIMON. Senator Dodd?

Senator Dodd. I apologize for coming in here late. We had a markup in another committee of two or three pieces of legislation.

I looked over your "Autobiography for the Defense," and you had some interesting comments with regard to the polygraph. On page 65 of that autobiography—and I quote you here—you say, "It would be extremely unusual for a competent lawyer to let the other side select an expert"—a polygraphist in this case—"especially in view of the fact that the expert testimony in general too often aligns itself with the man who is paying the bill."

Assuming that the employer is going to be paying the bill, why would the employee subject himself to that kind of a test if in fact your statement here is accurate?

Mr. Bailey. I believe that was applied to experts generally, and it is a problem we have in the legal profession. Everybody can always find a psychiatrist to agree with him.

Fingerprints, ballistics evidence—not so. We very seldom see the collusion. The polygraph examiners have these constraints. First of all, when they call a specific, they always run the risk that history will prove them wrong—someone else will confess, the man's innocence will be shown and they called him guilty—so they are very constrained.

Second, they have to answer to the profession; and flaws in polygraph tests are very widely publicized.

Third, if they ever take money to corrupt a test and are accused of it and refuse a test, they are done. They cannot say, "This is an inaccurate technique, and it would not help me if I were innocent." They cannot do that.

So they are pretty well-regulated. In addition to that, if a person is both licensed in his State if there is licensing, and a full member of the American Polygraph Association—which many of your witnesses are not—you can rely on the fact that you probably have an examiner of very good skill and very good integrity. There is public protection. If anything, we need more professional regulation. We do not need to wipe out the asset.

Senator Dodd. Well, there may be a better way. I appreciate what you are saying, and I see some merit, but you obviously appreciate as well the concerns of the other side, that no matter how well-regulated and so forth, if I am paying for the services of someone, there is a tendency to want to perform your duties and functions, I suppose—no matter how hard one tries to be objective, there is that problem.

Is there maybe a better way of providing for the hiring of the polygraphist, or——

Mr. Bailey. Yes, if I thought there were any danger that that would infect the profession. I must tell you that when defense lawyers bring their clients to polygraphers, there is no friendly examiner. The phenomenon is a fraud. Eighty percent are flunked—80 percent. Now, that is not trying to please the guy paying the tab.

Massachusetts addressed the battle of the experts by using a neutral—anybody can call anyone he wants. You could always get a neutral, the same way arbitrators get a neutral.

If that turned out to be a problem, which I do not think it is—I have not run into it—and I know most of these people pretty well, and what they do, and when they slip up, it echoes throughout the profession—if that were a problem, there is a way to address it, short of making them outlaws.

Senator **Dodd**. Thank you.

Mr. **Bailey**. I would like to point out, Senator, parenthetically, that once this august body almost caused my indictment, and I stopped it with a polygraph test. It was called the Watergate Committee.

Senator **Dodd**. Thank you, Mr. Chairman.

The **Chairman**. Thank you so much, Senator.

Thank you so much, Mr. Bailey. We appreciate your being here, and we appreciate your testimony here today.

Mr. **Bailey**. Thank you for the opportunity, Senator.

The **Chairman**. Thank you, sir. We appreciate it.

Our next two witnesses will be Dr. Leonard Saxe, associate professor of psychology at Boston University, and the author of the 1983 Office of Technology Assessment report on polygraphs, and Lawrence W. Talley, chairman of the Georgia State Board of Polygraph Examiners.

Dr. Saxe, we will begin with you and then go to Mr. Talley. We are going to have to limit everybody to 5 minutes from here on in, because I am running out of time.

We will turn to you, Dr. Saxe.

## STATEMENT OF DR. LEONARD SAXE, ASSOCIATE PROFESSOR OF PSYCHOLOGY, BOSTON UNIVERSITY, BOSTON, MA; AND LAWRENCE W. TALLEY, CHAIRMAN, GEORGIA STATE BOARD OF POLYGRAPH EXAMINERS, ROSWELL, GA

Dr. **Saxe**. Thank you, Senator.

I thank you for introducing this legislation. I would like to submit my statement for the record and will briefly summarize it.

I strongly support S. 1815. Enactment will serve to protect workers, employers, and the commonwealth.

Three years ago, for the Office of Technology Assessment, I assessed the scientific validity of polygraph tests. Our comprehensive review found neither theory nor data to support their use in the workplace.

No evidence exists that a unique physiological reaction to deception can be detected. In my judgment, prohibiting use by employers is an important step in controlling a deceptive and inaccurate technology.

Proponents claim that lying produces changes in heart rate, respiration, and skin conductance. Such theorizing is both facile and inaccurate. Sometimes, we are physiologically aroused when we lie, but arousal also results from benign causes. When people are anxious because they are being untruthful, the test is not functioning as a lie detector, but as a fear detector. As long as those subjected to a test believe that it can determine truthfulness, they may react physiologically to questions on which they are being dishonest.

Polygraphers acknowledge the centrality of fear. Much of their technique focuses on convincing subjects of its efficacy—a maneuver called establishing the psychological set. The polygraph, with its probes affixed to various parts of the subject's body, is a theatrical prop, not a truth verification machine.

We just completed a series of experiments where in one situation, we try to convince subjects of the polygraph's infallibility and ability to detect deceptiveness. In another situation, we indicated that the machine was fallible and demonstrated how a person could avoid detection. The results were absolutely clearcut. When subjects believed that the machine was infallible, almost all guilty subjects were detected. When subjects believed that the machine was fallible, we obtained virtually no detection of guilt.

Our findings indicate that fear of detection is key to the conduct of polygraph tests and that the polygraph is thus a placebo. Effectiveness depends upon the subject's naive belief. Problems arise when subjects do not share the examiner's belief in the divining rod capabilities of the machine. In such cases, dishonest subjects may not fear detection, and innocent subjects may appear deceptive.

Such problems are endemic to polygraph tests used in the employment context. Such tests fail to control for placebo effects and arousal that results from being asked about significant issues. What we have is a technology based upon scaring people into believing that they are physiologically transparent.

Were logic to prevail, I do not think we would be here at this point. Yet, we have been barraged by evidence on the efficacy of the polygraph that seems to suggest otherwise. This evidence ranges from serious research to half-baked surveys that would not pass muster in my sophomore research methods course. In fact, there is little research on polygraph tests—less than a dozen published studies of the actual use of polygraph tests are available. Although some will give you a numerical index of accuracy, such figures are drawn from fabric.

The polygraph test most often used in the workplace has received virtually no research attention. Not a single adequate field study exists of the validity of using polygraph tests to screen employees. Without such data, how can anyone claim its accuracy?

Even if one assumed that other polygraph research was relevant to employment testing, most studies share a basic flaw—the polygrapher has available information in addition to the physiological data. When polygraphers score charts blindly, error rates are high. Polygraphers may be fine detectives but they do not possess the unique insight into individuals' innermost thoughts.

Any test used to screen employees, particularly those with sensitive jobs, should meet reliability and validity criteria. Psychologists are only permitted to use those tests that meet such standards. As has previously been discussed, the American Psychological Association has gone on record on this issue.

My own view is that absent generic regulation of tests, the present bill provides necessary protection. I urge that S. 1815 be adopted in its original form, and that the Senate reject amendments voted by the House which exempt various employees. It makes no sense to exempt individuals because they are in positions of great responsibility. Despite the well-meaning efforts of those who promote polygraphy as a deterrent to employee crime, it cannot serve as a deterrent for long.

The prohibition of polygraph testing would protect employees, employers, and society. Employees with integrity would be protected from being falsely accused, and those who are most dangerous would not be exonerated. Employers would not be lulled into a false sense of security. And all of us will benefit when this deceptive and dangerous technology is eliminated.

Thank you, sir.

The CHAIRMAN. Thank you so much, Dr. Saxe.

[The prepared statement of Dr. Saxe and responses to questions submitted by Senator Quayle follow:]

Statement of

LEONARD SAXE, PH. D.

Associate Professor of Psychology

Boston University

on

POLYGRAPH TESTS IN THE WORKPLACE

COMMITTEE ON LABOR AND HUMAN RESOURCES

UNITED STATES SENATE

April 23, 1986

Center for Applied Social Science

195 Bay State Road

Boston, MA  02215

I applaud the Chairman and my senior Senator for introducing S.1815 to prohibit the use of polygraph tests in the workplace. I am pleased to submit this statement and hope that it will be useful to the Committee in their consideration of polygraph legislation. I am a research psychologist and was senior author of the Office of Technology Assessment (OTA) report, "The Scientific Validity of Polygraph Tests." Currently, I am Associate Professor of Psychology and Acting Director of the Center for Applied Social Science, at Boston University. I appear today on my own behalf and my views do not necessarily reflect those of my university or of the Office of Technology Assessment.

## Need for Prohibition

I strongly support S.1815 — polygraphy has no place in the American workplace. Enactment of this bill will serve to protect workers, employers and the commonweal. Three years ago, in the wake of the President's decision to expand use of polygraph tests with government employees, I was asked by the Office of Technology Assessment to assess the scientific literature on the conduct of polygraph tests. The results of our comprehensive review did not support the application of polygraph tests in workplace contexts. Neither theory nor data support the validity of such polygraph tests. No evidence exists that a unique physiological reaction to deception can be detected. To the extent polygraphy is useful, it serves as a placebo. Unlike placebos used in medicine, however, a polygraph test achieves it effects by inducing fear.

As a result of my work for OTA, I have become an actor in the scientific and public debate over polygraphy and have continued to follow the scientific literature, as well as to conduct polygraph research. My initial assessment of the literature has only been strengthened. Increasingly, I am frightened by the widespread use of polygraph tests — particularly in the workplace, but also in our criminal justice system and by government agencies. Prohibiting their use by all private employers is an important step in controlling what is basically a deceptive and inaccurate technology.

Rationale

At the core of a scientific analysis of polygraph testing is its theoretical rationale. Proponents of polygraph testing hypothesize that there is a physiological reaction associated with being deceptive that can be measured by their instrument; that is, "lying" produces changes in heart rate, respiration, and skin conductance. Such theorizing is both facile and inaccurate. To be sure, under some conditions individuals exhibit physiological arousal when lying, but arousal may also result from more benign causes. For example, a person may be afraid of the test or may merely be concerned with his or her truthfulness.

A polygraph test is not always incorrect — people can be anxious because they are being untruthful, but the instrument does not function as a "lie detector." A more precise explanation is that the polygraph functions as a "fear" detector. As long as people subjected to a polygraph test believe that the test can determine truthfulness, they may show greater physiological change to questions on which they are being dishonest compared to questions on which they are being truthful. This is a shaky basis on which to build a technique to assess the honesty of employees.

I am not the first to discover that the lie detector is a fear detector — polygraphers implicitly acknowledge the centrality of fear to achieving effectiveness. Much of the polygraph technique focuses on convincing testees as to the efficacy of the procedure. Examiners, very few of whom are trained psychologists, refer to this maneuver as establishing the "psychological set." It often involves conducting card tricks to "stimulate" the necessary fear of the machine. An effective polygraph examiner is able to make a deceptive person "fearful" of being detected. The polygraph instrument with its probes affixed to various parts of the subjects' body, rather than being a truth verification machine, is more like a theatrical prop.

We have just completed a series of experiments at Boston University where we conducted polygraph tests under two conditions. In one situation, we tried to convince subjects of the polygraph's infallibility and demonstrated its ability to detect deceptiveness. In another situation, we indicated that the "machine" was fallible and demonstrated how the person could lie without being detected. The results are clear-cut. When subjects believed that the polygraph test was infallible, high rates of detection of guilty subjects were obtained. When subjects believed that the machine was fallible, however, we got virtually no detection of guilty individuals. Our findings, albeit preliminary, strongly indicate that fear of detection is key to the conduct of polygraph tests.

The polygraph is, thus, a placebo rather than an effective treatment. Placebos — such as those used in medicine — do function, but they cannot be relied upon. Their effectiveness is dependent on the subject's naive belief. Problems arise when subjects do not share the examiner's unequivocal belief in the divining rod capabilities of the machine. In such cases, dishonest subjects may not be aroused because they do not fear detection. Innocent subjects, though, may appear deceptive since they may fear the test will not establish their veracity. Unless one could be assured of the subject's full cooperation — improbable in a polygraph examination — it is nearly impossible to rule out such interference with the results.

Such conceptual problems with the underpinnings of polygraph theory are especially problematic for the type of polygraph test used in typical employment contexts. In such situations, the person's physiological reactions to "relevant questions" (e.g., items on a job application) are compared to irrelevant questions (e.g., what day of the week it is). Widely used because of its simplicity, it is employed to screen those not accused of a specific crime. Such tests fail to control not only for placebo effects, but also for the natural arousal that results from being asked about significant issues.

Additional types of polygraph examinations are used in work place testing, particularly when the employer is acting in the role of the police to investigate a specific incident. In such cases, a polygraph examination is used that attempts to control for physiological changes attendant to being asked about significant issues. Curiously, though, such control question tests rely on an examiner's assumption about the person's truthfulness in replying to certain questions. These specific incident tests also frequently involve invasions of privacy and require addressing areas of a person's life not directly relevant to the incident under investigation.

What we have, then, is a technology based on scaring people into believing that they are physiologically transparent. To be sure, compliant subjects may be culpable, but compliant subjects may also be innocent. Equally, if not more disconcerting, the culpable may be non-compliant. Is a technology dependent on such a foundation appropriate for the workplace?

## Empirical Evidence

Were logic alone to prevail, the answer would be a resounding "no" and we would not have reached the present policy nadir with respect to polygraphy. Instead, we have been barraged by a collection of somewhat contradictory evidence on the efficacy of the polygraph. This research literature, ranging from serious psychophysiological work to half-baked surveys that would not pass muster in my sophomore research methods course, has been hotly debated by both scientists and non-scientists. As with many scientific problems, no simple summary is possible and the problem is far more complex than most maintain.

It may seem as if there are a great deal of both field and laboratory data about polygraph tests, but there are not. Depending on one's criteria for scientific rigor, there are only between 2 and 12 published field studies, and perhaps 2 dozen direct laboratory analogue studies. Although some will give you a numerical index of accuracy, such figures are drawn from fabric, not research. To be sure, research on lie detection is inherently difficult, but it is still the case that available research is fraught with methodological problems that impede generalization.

Perhaps the most important research problem relevant to the Committee is that the type of polygraph test most often used in the workplace has received virtually no research attention. There is not a single adequate field study of the validity of using polygraph tests to screen employees. Since there are no scientific data, it is difficult to understand on what research basis anyone could claim its accuracy or appropriateness. The limited research evidence is almost exclusively of control question tests used in specific incidents to assess the truthfulness of criminal suspects. Most often, such research has been done in serious cases such as murder and sexual assault.

Even if one were to assume that specific incident research had some relevance to employment testing (an assumption that is probably unwarranted), most of the studies share a basic flaw. In order to compare results of polygraph tests with known facts that establish the correctness of the judgment, it is necessary to select carefully the cases. What results is a selection of cases where there is a preponderance of other evidence or a confession (induced by the demands of the polygraph test). In most cases, polygraphers had access to this information. Interestingly, those investigations where the polygrapher scores his charts "blindly", the error rates are substantially higher than in other studies.

In a recent article in the prestigious journal, Lancet, Drs. Brett, Phillips and Beary demonstrate how knowledge of the probable guilt of a suspect affects the utility of the polygraph examination. According to their analysis, the usefulness of a polygraph test is directly correlated with the probability of guilt or innocence. Polygraphers may be fine detectives, but they do not possess unique insight into an individual's innermost thoughts.

## Implications

As a psychologist, I would prefer that any tests used to screen employees — particularly those with sensitive jobs — meet rigorous standards such as those promulgated by the American Psychological Association and the American Educational Research Association. These test standards require that psychologists only use tests that meet reliability and validity criteria. If such standards were applied to polygraphers, I have no doubt that polygraph tests would be relegated to the same historical position as sensory tests that were once thought to be indicative of intelligence. The American Psychological Association has recently taken the extraordinary step of passing a resolution on polygraph tests. APA's resolution calls the scientific evidence on polygraph tests "unsatisfactory", and says that the possibility of damage to innocent individuals is large.

Absent generic federal or state regulation of workplace tests, the present bill provides necessary protection for those who might be subjected to polygraph tests. I would urge that S.1815 be adopted in its original form and that the Senate reject the amendments voted by the House of Representatives to the companion legislation. The amendments exempt various employee and employer groups from purview. It makes no sense to exempt individuals simply because they are in positions of great responsibility. In fact, the probability of error may be greater in such situations. Despite the well-meaning efforts of those who promote polygraphy as a deterrent to employee crime, it cannot serve as a deterrent for long. As a placebo, it's effective life is short, indeed.

Let me be clear: The prohibition of polygraph testing would protect employees, employers, and society. Employees with integrity would be protected from being falsely accused of misdeeds and those who are most dangerous would not be exonerated by a polygraph test. Employers would not be lulled into a false sense of security about the problems connected with failing to identify dishonest employees and from misidentifying honest workers. We will all benefit when this basically deceptive and dangerous technology is eliminated from the workplace.

None of us condones theft in the workplace or other types of criminal behavior. Were I convinced that polygraph tests were at all helpful in preventing such abuse, I would argue very differently. In fact, polygraph tests do not work very well. To the extent that they produce "correct" answers, it is not because they are detecting lies. As Lewis Thomas once mused, if only the polygraph functioned as a smoke alarm in the brain, we would have evidence of a biological mechanism to prevent prevarication by members of our species. The polygraph is not such a mechanism and, if it were, our world would be a very different place.

Boston University

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Center for Applied Social Science

May 7, 1986

Senator Orrin G. Hatch
Chairman
Committee on Labor and
 Human Resources
428 Dirksen Center Office Building
Washington, DC 20510

Dear Senator Hatch:

Enclosed please find the collected transcript of my comments before the recent hearing on S. 1815. Also enclosed are answers to the questions posed by Senator Quayle

Thank you for inviting me to participate in the hearing concerning the conduct of polygraph tests in the work place. I hope that my testimony was useful as you consider pending legislation.

Please have your staff contact me if I can be of any further assistance.

Sincerely yours,

Leonard Saxe

Leonard Saxe, Ph.D.
Associate Professor of Psychology

LS/cl
Enclosures

Responses of Professor Leonard Saxe to Questions by Senator Dan Quayle

(Hearing on S. 1815).

1. When should the federal government regulate hiring and firing?

As a non-lawyer, my response is simple: When it is in the national interest. The national interest would seem to be present when great harm could result from the absence of regulation and to the extent that fundamental rights of individuals are involved. Conditions of employment are already heavily regulated by the federal government, as are inefficatious medical clinics.

2. When should the regulation of hiring and firing be left to the states?

States should be involved in the regulation of hiring and firing to the extent that such regulations promote the general welfare and there is no superseding federal regulation. State regulation would seem most appropriate when specific regional and local issues make the application of broader rules difficult.

3. Why should the federal government prohibit polygraphs?

The federal government should prohibit polygraph examinations because the practice is inherently deceptive and inaccurate. The widespread use of polygraph tests will make it easier for sophisticated criminals to obtain positions of trust in business and other organizations and will result in the incorrect identification of a large number of honest individuals as untrustworthy. Local regulation, which exists in the majority of states, is inadequate. State laws vary in their scope and application. Numerous reports exist of companies evading state regulation by taking advantage of looser regulations in neighboring states. There is no inherent difference among regions or localities in the feasibility or utility of polygraph tests and, hence, federal regulation is preferable to the current patchwork.

4. Isn't the real question improper use of polygraphs and not that they are all bad?

There is no way to use properly (i.e. validly) a polygraph test, at least within the scope of practices currently sanctioned by the American Polygraph Association. It is only a record of simple physiological changes made in response to questions by an examiner. As a screening device to detect dishonest employees, I cannot conceive of an appropriate use. There are methods, based on assessment of physiological responses, that can be used when a specific incident with a great deal of information is available, but this circumstance is unlikely to arise in a business setting. If it dose arise, it is far better handled by a police agency.

5. Do you favor the exemptive approach to the use of polygraphs?

I do not favor the exemptive approach to the use of polygraph tests. My view is that polygraph tests have no valid use in the private sector.

This is even more so for those private sector situations in which it is essential to determine the trustworthiness of employees.

6. Why should exemptions be permitted for some industries and businesses and not others?

It does not make sense from scientific point of view, although it might from a political perspective, to exempt certain industries or businesses. The exemptions have tended to favor situations in which great harm could result from dishonest employees. Unfortunately, the more sensitive the position, the more likely that dishonest individuals will have experience in "passing" polygraph tests. Large numbers of completely honest individuals would have to be found untrustworthy for there to be any likelihood of detecting true criminals.

7. If polygraphs were "all bad", why should the Department of Defense be permitted to use them? Why should intelligence and counterintelligence agencies of the federal government be permitted to use polygraphs if they are unreliable?

Views are highly discordant with regard to the use by the Department of Defense (DoD) of polygraph examinations. The Senate Armed Services Committee has consistently withheld approval (other than for a pilot program) of the use of polygraph tests as an employee screening device. It should also be recognized that the majority of use of polygraph tests by DoD is in situations far different than those in employment contexts. Even today, the majority of uses of the polygraph are with criminal suspects. Government polygraph examiners also work under strict guidelines and intense supervision. Even if one were to view DoD's use of polygraph tests as reasonable, the situation is so different that they are incomparable to any private sector employment context.

8. If polygraphs are so unreliable, why should day care centers and nursing homes be permitted to use them?

Day care centers and nursing homes should not be permitted to use polygraph tests. One runs the risk, perhaps even greater than without polygraph tests, of hiring potential child molesters and abusers. There are no data to support the validity of this use of polygraph examinations.

The CHAIRMAN. We will turn to you now, Mr. Talley, and take your testimony.

Mr. TALLEY. Thank you, Mr. Chairman.

My name is Lawrence W. Talley, and I am chairman of the Georgia State Board of Polygraph Examiners. The board, which is appointed by the Governor, regulates the administration of polygraph examinations and licensed polygraph examiners who do business in our State.

I worked closely with the Georgia General Assembly in drafting a bill which governs the polygraph industry. This law provides strict guidelines for examiners and strong protections for the rights of our citizens. It has been a model for other States and for the legislation which was introduced in the House by Congressmen Young and Darden.

In 1984, a reporter for a local television station broadcast a series of reports on the polygraph, recounting alleged abuses. This report helped inspire the Georgia General Assembly to pass a law that would stop improper practices. It is my understanding that copies of these broadcasts have been introduced in the current debate by opponents of the polygraph to justify a ban on its use. Yet the series was produced before the new Georgia law took effect and before our reforms were implemented.

News accounts of polygraph abuse continue to be presented. At times, reporters set up hypothetical investigations. These are designed to try to prove that the technique does not work or that the examiner can be fooled. They treat the polygraph like a game in which people are paid to try to fool an examiner who is investigating a crime that never occurred. Neither scientists nor practitioners know exactly how accurate real, live polygraph testing is.

But one thing that we all agree on is that there are some scientifically unacceptable ways of trying to determine this accuracy. For example, a major television news magazine program recently paid people to take polygraph examinations from different examiners under deceptive circumstances. The examiners were lied to about the circumstances that formed the basis of the testing. Scientific research tells us that it is easy for someone to make it appear as if they are being deceptive, but the research tells us that it is difficult for a truly deceptive person to appear to be truthful.

So it should come as no surprise that someone who is paid to appear as a liar is able to do so; but in an actual testing situation, what person who is actually telling the truth would want to make the examiner think that he or she is lying?

I give this example to show how efforts to sensationalize news reports can so distort what a polygraph is all about, and that is makes the conclusions drawn in the reports meaningless.

In 1968, Mr. Chairman, Georgia was one of the first States to pass a polygraph law. But in 1984, we saw that that law needed to be revised, partly because polygraph technology had advanced so much since then, and partly because we saw that the 1968 law just was not strong enough.

The citizens of Georgia, members of the Georgia General Assembly, and polygraph examiners worked together to develop this legislation. Because of this mutual effort, we are able to better protect our citizens. More importantly, we work hard to make sure that the examinees are protected and know their rights under the law.

Examiners are required to give those who take the test a copy of this "bill of rights." This form also explains the grievance and appeal procedures available to them.

Our citizens know that the State will investigate any violations that are reported. The abuses that polygraph critics say are so widespread simply have not materialized in Georgia, where we have given people every opportunity to appeal. Certainly, there seems to be no evidence of the kind of epidemic that would call for Federal action to put an entire industry out of business. Even when the House acted on legislation last month to ban polygraph use in the private sector, it did so only in a limited way—it provided exemptions to allow polygraph testing by security agencies, pharmaceutical companies, daycare centers, and others. The list of companies that need polygraph examinations to protect their customers, their innocent employees, and inventories does not end here.

For example, trucking companies need assurances that the drivers they hire are careful and responsible. This is especially important in this age of concern over drunk driving and drug abuse.

The polygraph works. It is not infallible, but it is a useful and sometimes essential part of a company's risk management program.

A regulatory bill similar to the one offered in the House by Congressmen Bill Young and Buddy Darden takes this approach. It also allows the States to make their own decisions in how to meet their standards.

Banning the polygraph in the private sector is not the answer. I urge the committee to take an approach which supports the rights of the States to regulate themselves and which gives American businesses access to the same tool that the Federal Government uses to carry out its responsibilities to our citizens.

Thank you, Mr. Chairman.

[The prepared statement and additional material of Mr. Talley follow:]

Testimony of Lawrence W. Talley

Chairman, Georgia State Board of Polygraph Examiners

Before the Labor and Human Resources Committee

United States Senate

April 23, 1986

My name is Lawrence W. Talley, and I am chairman of the Georgia State Board of Polygraph Examiners. The board, which is appointed by the Governor, regulates the administration of polygraph examinations and licenses polygraph examiners who do business in our state. In 1984 and 1985, I worked closely with the Georgia General Assembly in drafting a bill which governs the polygraph industry. This law provides strict guidelines for examiners and strong protections for the rights of examinees. It has been a model for other states and for the legislation which was introduced in the House by Congressmen Young and Darden.

Because of my association with the polygraph board and with developing this legislation, I would like to focus my remarks today on our experience in Georgia in regulating the polygraph industry.

On May 7th, 8th, and 9th of 1984, a reporter for a local television station broadcast a series of reports on the polygraph, recounting alleged abuses. The reporter interviewed people who had lost their jobs when they reportedly failed polygraph tests. This report helped inspire the Georgia General Assembly to pass a law that would stop improper practices. It is my understanding that copies of these broadcasts have been introduced in the current debate by opponents of the polygraph to justify a ban on its use. Yet the series was produced before the new Georgia law took effect and before our reforms were implemented.

News accounts of polygraph abuse continue to be presented. At times, reporters set up hypothetical issues to be investigated with the polygraph. These efforts are designed to try to prove that the technique doesn't work or that the examiner can easily be fooled. They treat the polygraph like a parlor game in which people are paid to try to fool an examiner who is investigating a crime that never occurred.

We acknowledge that neither scientists nor practitioners know exactly how accurate real life polygraph testing is. But one thing that we all agree on is that there are some scientifically unacceptable ways of trying to determine its accuracy. For example, a major television news magazine program recently paid people to take polygraph examinations from different polygraph examiners under completely fictitious and deceptive circumstances. The examiners were lied to about the circumstances that formed the basis of the testing. They were also lied to about the examinees who were paid to role-play for the cameras.

Scientific research tells us that it is relatively easy for someone to create responses that can make it appear as if they are being deceptive. But the research tells us that it is difficult for a truly deceptive person to falsify responses in order to appear to be truthful. So it should come as no surprise that someone who is motivated to appear as a liar is able to do so. But in the "real world" -- in an actual testing situation-- what person who is actually telling the truth would want to make the examiner think that he or she is lying? I give this example in order to show that efforts to sensationalize new reports can so distort what a polygraph is all about as to make the conclusions drawn in the reports meaningless.

I would like to return now to the situation in Georgia. From 1976-86, I was Vice President of Risk Management for Days Inns of America, which operates 425 hotels and motels nationwide. The polygraph has been invaluable to the company. For example, in 1975, Days Inns had internal losses of over $1 million a year. After we instituted a loss prevention program, in which the polygraph played a key role, we were able to reduce these losses to an average of $115,000 a year. At the same time these losses were reduced by 87 percent, company revenues tripled.

I have seen many times where the polygraph has been valuable to both employers and employees. But I also know that the polygraph results are only as good as the person conducting the examination.

In 1968, Georgia was one of the first states to pass polygraph legislation. But in 1984 we saw that the law needed to be revised, partly because polygraph technology had advanced so much since then and partly because we saw that the 1968 law just wasn't strong enough. Members of the General Assembly, polygraph examiners, and the citizens of Georgia worked together to develop the legislation. Because of this mutual effort, we are better able to protect our citizens.

I became involved in working with the Georgia General

Assembly to develop a regulatory bill because I believe that business needs the polygraph. But I also know that the examiner must follow certain guidelines for the test to be accurate and for examinees to be protected.

The Georgia bill is progressive and restrictive. Polygraph examiners must have a college degree, or two years of college plus two years of experience with a law enforcement agency in addition to their polygraph training. We regulate the kind of equipment they can use, the kinds of questions they can ask, and the confidentiality of the test results. We have the authority to provide a program of continuing education for examiners, and insist that they provide examinees with the test results on request.

More importantly, we worked hard to make sure that examinees are protected and know their rights under the new law. We developed a consent form that people must sign before they take an examination. It explains that they have a right to stop the examination at any time; it tells them the kinds of questions that can and cannot be asked; and it tells them their rights in finding out the results. Under Georgia law, examiners are required to give those who take the test a copy of this bill of rights. This form also defines the grievance and appeal procedures available to our citizens.

The Georgia Secretary of State's office was concerned about this last provision because it was charged with handling the complaints. Thomas E. Mishou, executive director of the

Examining Boards Division of the Secretary of State's office, expected at least 45 complaints a month. He based this estimate on testimony about abuses from those who wanted the state to ban polygraph testing.

The Georgia regulatory law went into effect in July of 1985. Since then, there have been an average of only two complaints a month about polygraph tests, even with all of the publicity and the ease of reporting violations. Only a few were cases that indicated the polygraph examiner had acted improperly.

Our citizens know that the state will investigate any violations that are reported. The abuses that polygraph critics say are so widespread simply have not materialized in Georgia where we have given people every opportunity to appeal. Certainly there seems to be no evidence of the kind of epidemic that would call for federal action to put an entire industry out of business.

Of course, it is always possible to find instances of polygraph abuse. But in Georgia, we have found a way to minimize this potential for abuse by carefully regulating and monitoring the industry. The Georgia State Board of Polygraph Examiners has the authority, which it has used, to revoke the licenses of those few examiners whom we felt were acting improperly.

The polygraph's effectiveness has been shown to be in the range of 90% when the examination is properly administered by a competent examiner. In passing the Defense Authorization Bill last year, the Congress reaffirmed its position on the continued and increased use of the polygraph in the government sector. Even when the House acted on legislation last month to ban polygraph use in the private sector, it did so only in a limited way. It provided exemptions to allow polygraph testing by security agencies, pharmaceutical companies, day care centers, and others. The list of companies that need polygraph examinations to guard the safety of their customers, to protect innocent employees, and to protect their inventories does not end here. Dozens of other industries which would be prohibited by the House bill from using the polygraph still need help in protecting company assets and selecting responsible employees.

For example, the guests who stay at hotels and motels need protection from employees who might use their access to room keys to rob or assault them. Trucking companies need assurances that the drivers they hire are careful and responsible. This is especially important in this age of concern over drunk driving, drug abuse, and transportation of chemicals and other dangerous substances.

Jewelry companies also need to screen personnel who have access to products that can fit in the palm of a hand and are worth tens of thousands of dollars. We read news stories about contamination in commercially processed food, reminding us each day of the responsibility of the people in this industry.

It would be inaccurate if I were to leave the impression that the polygraph should be used by most businesses on most employees. This is not the case. Employers know that the majority of workers are honest and hardworking citizens. Their concern is about the isolated few who would violate their company's trust, possibly jeopardizing customers and the livelihoods of innocent co-workers.

The polygraph works. It is not infallible, but it is a useful and sometimes essential part of a company's risk management program.

Mr. Chairman, I believe that our experience in Georgia demonstrates that the states are the best and most appropriate entities to enact and enforce polygraph legislation. The states regulate most other professionals which provide services to their citizens, such as real estate brokers, doctors, dentists, optometrists, and lawyers. The state is also the appropriate jurisdiction for legislation to regulate the polygraph profession.

A regulatory bill similar to the one offered in the House by Congressmen Bill Young and Buddy Darden takes this approach. It sets standards for regulation, standards which we know work in Georgia. It also allows the states to make their own decisions about how to meet these standards to protect residents.

Banning the polygraph in the private sector is not the answer. I urge the Committee to take an approach which supports the rights of the states to regulate themselves and which gives American business access to the same tool that the federal government uses to carry out its responsibilities to our citizens.

Mr. Chairman, I have attached a copy of the Georgia state law and a copy of the consent form for your review.

I would be happy to answer any questions that you might have.

**State law provides that any individual requested to take a polygraph examination be given the following notice. (O.C.G.A. 43-36-15).**

## CONSENT TO POLYGRAPH EXAMINATION

(A) I understand that I am voluntarily consenting to take this polygraph examination, and that I have the right to terminate or ask that the examination be stopped at any time.

(B) I understand that in matters relating to pre-employment or periodic employment examinations, the polygraph examiner cannot inquire into or ask any questions concerning the following:

1. Religious beliefs or affiliations;
2. Beliefs or opinions regarding racial matters;
3. Political beliefs or affiliations;
4. Beliefs, affiliations, or lawful activities regarding unions or labor organizations; or
5. Sexual preferences or activities.

(C) I understand that, upon written request, I shall be provided with a written copy of any opinions or conclusions rendered as a result of this examination. (The State Board of Polygraph Examiners is authorized to establish by Rule a reasonable fee for the provision of such copy.)

(D) I understand that my polygraph examination is being conducted by:

______________________________ Ga. Polygraph License #____________________
Name of Examiner License Number

______________________________________________________________________
Business Address

(E) I understand that I have the right to file a complaint with the State Board of Polygraph Examiners, 166 Pryor Street, S.W., Atlanta, Georgia 30303, if I feel that this polygraph examination was improperly conducted.

I certify and declare that I have read and understand the above notification, and further declare that I voluntarily consent to take this polygraph examination.

This __________ day of ______________________, 1985.

_________________________________
Signature of Examinee

_________________________________
Signature of Examiner

## GEORGIA POLYGRAPH EXAMINERS ACT.

Code Title 43, Chapter 36 Revised.
Code Section 51-1-37 Enacted.

No. 625 (Senate Bill No. 19).

### AN ACT

To amend Title 43 of the Official Code of Georgia Annotated, relating to professions and businesses, so as to comprehensively revise the provisions relating to the regulation and licensure of polygraph examiners; to provide for legislative intent; to provide a short title; to define certain terms; to create the State Board of Polygraph Examiners; to provide for qualifications, terms of office, reimbursement, and powers and duties of the members of such board; to require polygraph examiners to have licenses; to provide qualifications for a license as a polygraph examiner; to require an applicant for a polygraph examiner license to complete a polygraph examiner intern program; to require licensed polygraph examiners to supervise and control polygraph examiner interns; to require applications for licenses; to provide for the issuance of licenses, renewal of licenses, and license fees; to provide for the continuation of certain licenses; to provide for reciprocity; to regulate the administration of polygraph examinations; to prohibit certain activities by polygraph examiners; to provide for rights of examinees; to provide for the maintenance of records of polygraph examinations; to provide for minimum insurance coverage or the posting of bonds or net worth affidavits; to provide for investigative and disciplinary authority of the board; to provide a penalty for the unlicensed administration of polygraph examinations; to provide for applicability; to provide a termination date; to provide for other matters relative to the foregoing; to amend Chapter 1 of Title 51 of the Official Code of Georgia Annotated, relating to general provisions regarding torts, so as to provide a cause of action for persons who suffer damages as a result of polygraph examinations; to provide for damages; to provide for legislative intent and applicability; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

**Section 1.** Title 43 of the Official Code of Georgia Annotated, relating to professions and businesses, is amended by striking Chapter 36, relating to polygraph examiners, in its entirety and inserting in lieu thereof a new Chapter 36 to read as follows:

## "CHAPTER 36

43-36-1. The General Assembly declares that it is the policy of this state that the only proper uses of a polygraph shall be to measure stressful physiological responses for the purpose of detecting deception or verifying truth of statement or for scientific or academic research or experiments. Any use of a polygraph or a polygraph examination which is primarily intended to frighten or intimidate rather than measure stressful physiological responses is declared to be improper.

43-36-2. This chapter shall be known and may be cited as the 'Georgia Polygraph Examiners Act.'

43-36-3. As used in this chapter, the term:

(1) 'Board' means the State Board of Polygraph Examiners.

(2) 'Polygraph' means an instrument to measure stressful physiological responses for the purpose of testing or questioning individuals so as to detect deception or verify truth of statement. Such instrument shall, as a minimum, record visually, permanently, and simultaneously a subject's cardiovascular pattern, respiratory pattern, and galvanic skin response.

(3) 'Polygraph examiner' means any person who measures stressful physiological responses which purport to detect deception or verify truth of statement through the use of instrumentation as described in paragraph (2) of this Code section.

(4) 'Polygraph examiner intern' means any person engaged in the study of polygraphy and the administration of polygraph examinations under the personal supervision and control of a polygraph examiner.

43-36-4. (a) There is created a board to be known as the State Board of Polygraph Examiners. The board shall consist of seven members who shall be residents of this state.

(b) Four members shall be polygraph examiners who have qualified under this chapter and who have been licensed polygraph examiners for at least four years. The terms of these four members shall be four years each. The terms shall be staggered so that one term expires each year. Two of such members shall be from the private sector and two shall be from the government sector.

(c) One member shall be appointed as a representative of the area of private-sector employment. Such member shall be appointed for a term of four years.

(d) One member shall be appointed as a representative of the scientific or academic community who has some knowledge of polygraphs or polygraph examinations. Such member shall be appointed for a term of four years.

(e) One member shall be appointed from the public at large and shall have no connection whatsoever with the profession or practice of polygraph examination. The initial term of appointment for the at-large member shall expire June 30, 1986; thereafter, the Governor shall appoint successors for a term of four years.

(f) The members of the board shall be appointed by the Governor. No two members shall be employed by the same person or agency while serving on the board. Vacancies occurring on the board shall be filled by the Governor. When an appointment is made to fill a vacancy caused by death or otherwise, such appointment shall be for the remainder of the unexpired term of the member whose position was filled. No member shall serve more than two consecutive full terms.

(g) The members of the board shall annually appoint one of its members to be chairman.

(h) Members of the board shall be reimbursed as provided for in subsection (f) of Code Section 43-1-2.

(i) No member may directly or indirectly engage in any board business involving any individual which that board member has supervised or instructed.

(j) The joint-secretary shall serve as secretary of the board.

(k) The members serving on the State Board of Polygraph Examiners on July 1, 1985, shall continue to serve their respective terms of office.

43-36-5. The board shall have the following powers and duties:

(1) To determine the qualifications and fitness of applicants for licenses consistent with this chapter;

(2) To issue, renew, deny, suspend, or revoke licenses consistent with this chapter;

(3) To initiate investigations for the purpose of discovering violations of this chapter;

(4) To hold hearings on all matters properly brought before the board in connection with such investigations, to administer oaths, receive evidence, make the necessary determinations, and enter orders consistent with the findings;

(5) To establish continuing education requirements by rules and regulations; and

(6) To adopt, amend, or repeal all rules necessary to carry this chapter into effect.

43-36-6. (a) In order to qualify for a license as a polygraph examiner, a person must:

(1) Be at least 21 years of age;

(2) Be a citizen of the United States;

(3) Be a person of good moral character;

(4) (A) Have a bachelor's degree from a full four-year accredited university or college recognized as such by the board; or

(B) (i) Have completed two years of study, or its equivalent, at such a university or college which shall include at least one course in physical science and one course in psychology; and

(ii) Have at least two years' experience as an investigator or detective with a municipal, county, state, or federal agency.

Official transcripts must be submitted as proof for all college courses, technical courses, and other educational credits claimed by the applicant;

(5) Have satisfactorily completed a formal training course in the use of a polygraph. Such training shall be of at least six weeks' duration at a polygraph examiners' school acceptable to the board;

(6) Have completed a period of a minimum of six months as polygraph examiner intern under the supervision of a qualified polygraph examiner in this state or who has had sufficient training and experience in a state, federal, or municipal agency such that the board, in its discretion, may recognize the applicant as being properly trained and experienced; and

(7) Have passed any examination approved by the board for the purpose of determining the qualifications and fitness of applicants for licenses.

(b) The board, in its discretion, may waive the 'on premises' requirement during the internship period in cases of extreme hardship.

43-36-7. (a) Prior to examination, a polygraph examiner intern must administer a minimum of 100 examinations consisting of no less than 50 specific examinations in any given six-month internship period. The board, in its discretion, may require a polygraph examiner intern to bring all polygraph charts and allied papers resulting from the examinations conducted by the polygraph examiner intern for review by the board.

(b) The applicant must submit to the board for its prior approval the name of the licensed polygraph examiner who will supervise the applicant during the intern program.

(c) Once a licensed polygraph examiner has been approved to supervise a polygraph examiner intern, the intern may not transfer to the supervision of another licensed polygraph examiner without the prior approval of the board.

(d) (1) The polygraph examiner who supervises a polygraph examiner intern must:

(A) Be a polygraph examiner licensed by the board for a period of at least three years immediately prior to commencing such supervision; and

(B) Operate a polygraph or otherwise be involved in polygraph work during at least 75 percent of his time in his current employment position.

(2) A polygraph examiner may not supervise more than two polygraph interns at any one time.

(3) The intern shall be personally supervised and controlled by the licensed polygraph examiner approved by the board and such examiner shall be on the premises where any testing is conducted and available to such intern for instruction or consultation.

(e) The board shall provide by rule that the licensed polygraph examiner and the polygraph examiner intern shall submit a periodic list to the board of all polygraph examinations conducted by the polygraph examiner intern during such period, stating the names, dates, and types of examinations given by the polygraph examiner intern. This list shall be signed by both the licensed polygraph examiner and the polygraph examiner intern.

(f) The board may, in its discretion, require the licensed polygraph examiner to appear with the polygraph examiner intern at the board's examination and present to the board any or all of the polygraph charts and allied papers prepared by the polygraph examiner intern during the internship program.

43-36-8. Every person administering polygraph examinations must qualify individually for a license under this chapter and shall file with the board through the joint-secretary a written application accompanied by a fee established by the board.

43-36-9. (a) When the board is satisfied that the applicant meets the requirements set out in Code Section 43-36-6 for a polygraph examiner, the board shall issue and deliver to such applicant a license to conduct polygraph examinations, charging such fee for the issuance of the license as the board may establish. Such license shall not be transferable and shall be revoked or canceled only by the board.

(b) When the board is satisfied that the applicant meets the requirements set out in Code Section 43-36-6, except for the qualifications set out in paragraphs (6) and (7) of subsection (a) of Code Section 43-36-6, the board shall issue and deliver to such applicant a license to become a polygraph examiner intern, charging such fee for the issuance of the license as the board may establish. Such license shall not be transferable and shall be revoked only by the board.

(c) Notwithstanding any other provisions of this chapter, any person who has been issued a license by the board authorizing such person to administer polygraph examinations and whose license is valid on July 1, 1985, shall not be required to comply with the provisions of paragraphs (4) through (7) of subsection (a) of Code Section 43-36-6. Such person shall continue to be licensed and shall have his license renewed as long as he complies with the remaining provisions of this chapter.

43-36-10. Persons licensed to operate polygraphs under the laws of any other state having requirements similar to those of this chapter may, in the discretion of the board, be issued a license to operate polygraphs in this state without written examination upon the payment of a fee in an amount established by the board.

43-36-11. (a) All licenses issued under this chapter shall be renewable biennially.

(b) A polygraph examiner employed by a municipal, county, state, or federal agency shall not be required to pay any application or licensing fees as long as his sole use of the polygraph is in performance of his official duties, provided that such polygraph examiner must be properly licensed as provided in Code Section 43-36-9.

(c) All licenses shall at all times be posted in a conspicuous place in the principal place of business of the licensee in this state. The board shall issue to each licensed polygraph examiner an identification card which he must have in his possession when administering polygraph examinations at a location away from his normal place of business.

43-36-12. All polygraph examinations shall be conducted under such testing conditions as are established by rules and regulations of the board. Such conditions, at a minimum, shall provide that:

(1) No chart shall contain less than seven nor more than 15 questions;

(2) An examiner shall allow a minimum of ten seconds between questions to allow the subject ample time to respond physiologically to each verbal stimulus;

(3) (A) A polygraph examiner shall not produce a polygraph chart which is not adequately marked by the polygraph examiner to identify, at a minimum, each of the following:

(i) The individual being tested;

(ii) The date of the examination;

(iii) The time of the chart;

(iv) The chart and test number; and

(v) The polygraph examiner's initials.

(B) A polygraph examiner shall mark charts which are produced from instruments which contain electronically enhanced components to show the sensitivity level at the beginning of the chart and at any point where the sensitivity is changed;

(4) A polygraph examiner shall not perform more than two examinations per hour not to exceed 18 polygraph examinations in any one 24 hour period; and

(5) When a polygraph examination is being administered, no person shall be present in the room other than the polygraph examiner without the knowledge and prior consent of the examinee. No polygraph examination shall be monitored with viewing or listening devices without the examinee's knowledge.

43-36-13. (a) A polygraph examination shall consist of:

(1) A full and complete pretest interview;

(2) Chart examination; and

(3) A posttest interview when necessary. Such interview will include, but not be limited to, the examinee being informed of the examiner's opinion concerning the test results and an opportunity for the examinee to respond to those opinions rendered.

(b) No part of a polygraph examination shall be conducted other than personally by the polygraph examiner.

(c) (1) All conclusions or opinions of a polygraph examiner arising from the polygraph examination shall be in writing and shall be based on polygraph chart analysis. A polygraph examiner shall not render any conclusions or opinions without having produced two or more polygraph charts on the examinee covering the same questions.

(2) Only three types of conclusions or opinions will be rendered by a polygraph examiner:

(A) Deception indicated;

(B) No deception indicated; or

(C) Inconclusive chart analysis.

(3) Such conclusions or opinions shall contain no information other than admissions to relevant issues and interpretation of charts and shall contain no recommendation regarding the prospective or continued employment of an examinee.

(4) A polygraph examiner shall, upon written request, provide an examinee who requests within 15 days of the date of examination a written copy of all opinions or conclusions rendered and signed by the polygraph examiner within 15 days of the date the request is received by the examiner. The board is authorized to establish by rule a reasonable fee for the provision of such copy.

(d) No person except a licensed polygraph examiner shall conduct an interview in the presence of a polygraph which might lead the examinee to believe that such person is a polygraph examiner.

(e) A polygraph examiner shall not ask a question during a polygraph examination unless, prior to such examination, such question has been submitted in writing to the examinee, the polygraph examiner has reviewed such question with the examinee, and the examinee gives written consent to such question.

43-36-14. A polygraph examiner shall not inquire into any of the following areas during preemployment or periodic employment examinations:

(1) Religious beliefs or affiliations;

(2) Beliefs or opinions regarding racial matters;

(3) Political beliefs or affiliations;

(4) Beliefs, affiliations, or lawful activities regarding unions or labor organizations; or

(5) Sexual preferences or activities.

43-36-15. (a) In order to protect the rights of the examinee in the administration of a polygraph examination, the following minimum procedures must be followed:

(1) Each prospective examinee shall be required to sign a notification and receive a copy of such notification, prior to the beginning of a polygraph examination, which contains the following information:

(A) That he is consenting voluntarily to take the examination;

(B) That the polygraph examiner shall not inquire into any of the following areas during preemployment or periodic examinations:

(i) Religious beliefs or affiliations;

(ii) Beliefs or opinions regarding racial matters;

(iii) Political beliefs or affiliations;

(iv) Beliefs, affiliations, or lawful activities regarding unions or labor organizations; or

(v) Sexual preferences or activities;

(C) That he may terminate the examination at any time;

(D) That, upon written request, he shall be provided with a written copy of any opinions or conclusions rendered as a result of the examination. The board is authorized to establish by rule a reasonable fee for the provision of such copy;

(E) The name of the polygraph examiner, his polygraph examiner license number issued by the board, and his business address;

(F) The name and address of the State Board of Polygraph Examiners; and

(G) That he has the right to file a complaint with the board if he feels that the examination has been improperly conducted. The exact wording of this provision of the notification shall be prescribed by rules or regulations of the board;

(2) The board shall provide by rule for the form of the notification provided for in paragraph (1) of this subsection;

(3) (A) A polygraph examiner, when administering a polygraph examination, shall not attempt to measure stressful physiological responses on matters or issues not discussed with the subject during the pretest interview or not reasonably related to the matters or issues previously discussed with the subject.

(B) No polygraph examiner after conducting a preemployment polygraph examination shall conduct an accusatory interrogation for the purpose of eliciting a confession or admission against interest from the examinee; provided, however, that this subparagraph shall not preclude a polygraph examiner from informing the examinee of the results of the polygraph examination and giving the examinee an opportunity to explain such results.

(C) A polygraph examiner shall not knowingly coerce or intimidate a subject into signing a confession or verbally confessing to matters.

(D) A polygraph examiner shall not release the results of a subject's examination unless the examiner has obtained the prior written permission of the subject.

(E) A polygraph examiner shall not conduct an examination of a subject if the examiner knows or has reason to believe that the subject is mentally or physically incapable of undergoing a polygraph examination.

(F) An examinee shall be allowed to tape-record his examination concerning any matters directly relating to employment; and

(4) A licensed polygraph examiner, a licensed polygraph examiner intern, or an employee of a licensed polygraph examiner may only disclose information acquired from a polygraph examination to:

(A) The examinee or any other person specifically designated in writing by the examinee;

(B) The person, firm, corporation, partnership, business entity, or governmental agency that requested the examination; or

(C) Any person pursuant to and directed by court order.

(b) The rights and procedures provided for in this Code section shall not be affected by any contract or waiver and a polygraph examiner shall be prohibited from requesting that an examinee execute any such contract or waiver.

43-36-16. A polygraph examiner shall preserve and keep on file for a minimum of two years after administering a polygraph examination all opinions, reports, charts, question lists, and all other records relating to the polygraph examination.

43-36-17. (a) Except as otherwise provided in subsection (b) of this Code section, any polygraph examiner licensed under this chapter shall be required to acquire and maintain a minimum of $25,000.00 professional liability insurance. No licensee or applicant shall cancel or cause to be canceled any insurance policy issued pursuant to this Code section unless the board is so informed in writing by certified mail at least 30 days prior to the proposed cancellation.

(b) (1) In lieu of the requirements of subsection (a) of this Code section, each applicant for a license under this chapter shall provide satisfactory evidence to the board that the prospective licensee has posted or has made provision for the posting of a bond. The required bond shall be executed in favor of the state, in the amount of $10,000.00, with a surety company authorized to do business in this state and conditioned to pay damages not to exceed the amount of such bond to any person aggrieved by any act of the principal named in such bond, which act is in violation of this chapter and would be grounds for denial, suspension, or revocation of a license. Immediately upon the granting of a license, such bond shall be filed with the joint-secretary by the licensee and shall be approved by the joint-secretary as to form and as to the solvency of the surety. The prospective licensee may file the required bond with the joint-secretary prior to the granting of a license for the joint-secretary's approval. No licensee shall cancel or cause to be canceled a bond issued pursuant to this Code section unless the board is so informed in writing by certified mail at least 30 days prior to the proposed cancellation. In lieu of the required bond, the prospective licensee may submit a net worth affidavit, prepared using standard accounting procedures, which affidavit indicates that the prospective licensee has a net worth of more than $50,000.00. The board, in its discretion, may accept a financial affidavit in lieu of the bond required by this subsection. The board shall require licensees under this Code section to submit periodic financial updates to ensure continued financial responsibility. If the surety or licensee fails to submit, within ten days of the effective date of cancellation, a new bond or a net worth statement as outlined in this subsection, the board shall have the authority to revoke any license issued under this chapter.

(2) If the insurance policy or the bond issued as a requirement of this Code section is canceled for any reason by either the insurance carrier, surety, or licensee and the licensee fails to submit within ten days of the effective date of the cancellation either a new insurance policy, bond, or net worth statement showing that the licensee has a net worth of $50,000.00, calculated accord-

**ing to standard accounting procedures, the license of such person shall stand revoked. The board shall by rules and regulations provide procedures which will enable such a person with a revoked license to have the license reinstated upon proof of insurance, bond, or appropriate net worth statement.**

**(c) The board is authorized to provide by rule for the implementation and enforcement of this Code section.**

**(d) This Code section shall not apply to a polygraph examiner employed by a municipal, county, state, or federal agency as long as such examiner's sole use of the polygraph is in performance of his official duties.**

43-36-18. Investigative and disciplinary authority of the board shall be as provided for in Code Section 43-1-19.

43-36-19. It shall be unlawful for any person to conduct polygraph examinations unless he shall have first obtained a license as provided in this chapter and possesses all the qualifications prescribed by the terms of this chapter. Any person who conducts or attempts to conduct polygraph examinations without a license, or who buys or fraudulently obtains a license to conduct polygraph examinations, or who violates any of the terms of this chapter, or who uses the title 'polygraph examiner' or any word or title to induce the belief that he is a polygraph examiner, without first complying with this chapter, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than $100.00 nor more than $500.00, or by imprisonment in the county jail for not less than 30 days nor more than one year, or both, at the discretion of the court. All subsequent offenses shall be separate and distinct offenses and punishable in like manner.

43-36-20. It shall be unlawful for an employer or prospective employer to charge or require an employee or prospective employee to pay for any polygraph examination required as a condition of preemployment or continued employment.

43-36-21. This chapter shall not apply to any person who uses a polygraph for the sole purpose of conducting scientific or academic research or experiments. Such results shall be used exclusively for academic or scientific pursuits and in no way shall be used for specific employment or law enforcement or public safety objectives.

43-36-22. For the purposes of Chapter 2 of this title, 'The Act Providing for the Review, Continuation, Reestablishment, or Termination of Regulatory Agencies,' the State Board of Polygraph Examiners shall be terminated on July 1, 1987, and this chapter and any other laws relating to such board shall be repealed in their entirety effective on the date specified in Code Section 43-2-8."

**Section 2.** Chapter 1 of Title 51 of the Official Code of Georgia Annotated, relating to general provisions regarding torts, is amended by adding a new Code section immediately following Code Section 51-1-36, to be designated Code Section 51-1-37, to read as follows:

"51-1-37. (a) Any person who is given a polygraph examination and who suffers damages as a result of:

(1) Such polygraph examination having been administered in a negligent manner; or

(2) Such polygraph examination having not been administered in conformity with the provisions of Chapter 36 of Title 43

shall have a cause of action against the polygraph examiner.

(b) The measure of damages shall be the actual damages sustained by such person, together with reasonable attorneys' fees, filing fees, and reasonable costs of the action. Reasonable costs of the action may include, but shall not be limited to, the expenses of discovery and document reproduction. Damages may include, but shall not be limited to, back pay for the period during which such person did not work or was denied a job as a result of such examination."

**Section 3.** Nothing contained in this Act shall be construed so as to authorize the results of any polygraph examination to be introduced in evidence in any judicial or administrative proceeding in this state; provided, however, that such an examination given with respect to employment may be admitted in an administrative proceeding dealing solely with action taken with respect to the employment; nor shall this Act be construed as a legislative determination that such examinations are reliable to demonstrate any fact or that they have any probative value.

**Section 4.** All laws and parts of laws in conflict with this Act are repealed.

Approved April 4, 1985.

The **Chairman**. Thank you, Mr. Talley.

I want to thank both of you for your testimony.

Mr. Talley, I do have a few questions for you. As I understand it, you were instrumental in the drafting of the Georgia Polygraph Examiners Act; is that correct?

Mr. **Talley**. That is correct, sir.

The **Chairman**. Under the Georgia law, can a person be forced to take a polygraph examination?

Mr. **Talley**. Under the Georgia labor laws, a person can be required if it is a condition of employment with that particular employer—in other words, they know this prior to employment, that they have entered into an agreement with the employer that if asked to do so, they will consent to the test.

The **Chairman**. As I read the General Act and Resolution, section 4336.15 says, "In order to protect the rights of the examinee in the administration of the polygraph examination, the following minimum procedures must be followed: (1) each prospective examinee shall be required to sign a notification and receive a copy of such notification prior to the beginning of the polygraph examination which contains the following information: (a) that he is consenting voluntarily to take the examination . . .," and it goes on.

Now, despite that, he can be required to take the test?

Mr. **Talley**. Senator, the consent form that the examinee signs is the consent form to the polygraph examiner. A polygraph examiner cannot conduct an examination if it is not voluntary on the part of that particular individual. It would be physically impossible to do so.

The **Chairman**. So if he does not, can he be fired for refusing to take it?

Mr. **Talley**. Under current statute that if the person had entered into a prior contract with this employer, the condition of employment, yes, be could.

The **Chairman**. So it would not be a voluntary condition, under those circumstances.

Mr. **Talley**. It would be as far as the polygraph examiner giving the examination to the person, Senator.

The **Chairman**. Yes, but he either has to do it, or he can be fired.

Mr. **Talley**. By his employer.

The **Chairman**. That is right. Now, when you were in charge of security at Days Inn, did you ever terminate an employee who refused to take a polygraph examination?

Mr. **Talley**. I was a vice president with Days Inn for 10 years. We conducted over 10,000 examinations. I can only recall two instances where that was done, yes, sir.

The **Chairman**. But the point I am making is under Georgia law, the employee has a right to refuse to take a polygraph test, but can be fired for that refusal, in other words for refusing to do so, or exercising that right. Now, that would be a rather negligible right under those cirumstances, wouldn't you agree?

Mr. **Talley**. Well, he would be fired for his breach of his employment contract with the employer where he has so entered into that agreement to take the test if so asked. So the refusal—the basis for the termination would be breach of his contract with the employer.

The **CHAIRMAN**. Well, but what you are saying is that the employer can in essence force him to take the test or fire him.

Mr. **TALLEY**. An employer can ask the employee to take the test, and the person at that time has the choice to take the test or not to take the examination.

The **CHAIRMAN**. Or be fired, in essence.

Mr. **TALLEY**. Or he would lose his job.

The **CHAIRMAN**. That is right. That is my point. [Laughter.]

I think I made my point. That bothers me a lot.

Now, organized labor has pilloried me for a long time because of what was the labor law reform battle back in 1978. But I have always fought for employee rights and frankly, I think we fought for them in that battle. But it really bothers me. It bothers me that anybody could be fired just because they refuse to take a polygraph examination which even the top examiners admit, if administered properly by a top polygraph examiner over an extended period of time with appropriate analysis, is wrong 15 percent of the time. Now, I do not want anybody's job to depend on that.

And I do see the other side. I see the problem with widespread drug and alcohol abuse in this country, theft, deception and the many things that go on. On the other hand, you know, we are talking about people's individual fundamental employment rights here. And it really bothers me.

I want to be fair to the business community, but I also most of all want to be fair to the employees.

In your testimony, Mr. Talley, you indicated that you have been surprised that an average of only two complaints a month have been submitted to the State examining board division; is that a correct restatement?

Mr. **TALLEY**. That is correct, Senator.

The **CHAIRMAN**. Well, let me tell you about Mr. Lawrence Bunce, of Macon, GA. In December 1985, he signed a statement stating that he voluntarily agreed to take a polygraph test, but his boss had indicated that if Mr. Bunce did not take the test, he would be fired. He flunked the first test, and he asked to take another one but he flunked it again. The last question on each exam was: "Do you believe that this thing works?" That was the question. "Do you believe that this thing works?"

The first time, he said, "No". But he was told that he was registering on the examining machine as being deceptive.

So the second time, he said, "Yes," but he was told that he was again registering as being deceptive.

Now, the examiner called Mr. Bunce a thief and a liar, and he was fired. In March, Mr. Bunce filed a complaint with the Examining Board Division. It is now April 23. To date he has received no response, despite his repeated calls.

Now, given your statement that the State will investigate every complaint, and the alleged paucity of such complaints, why has Mr. Bunce's complaint never been examined?

Mr. **TALLEY**. It could be for several reasons, Senator. One, not knowing the date the complaint arrived at the secretary of State's office, it goes through certain channels at that particular office. The State polygraph office only meets once a month. So it could be that the complaint had arrived after the March meeting and is there for us to take up at the April meeting. I can assure you that if the complaint is there, the State will take the appropriate actions.

I would like to point out to you, too, Senator, that the original draft of our law in Georgia did have a provision in it that an employee should not be denied employment or terminated from employment for refusal to take a polygraph examination. Now, I did not pass the law, but I did help in the drafting of it, and that provision was taken out.

The **CHAIRMAN**. All right. I appreciate the testimony. I just would like to point out that the model statute which everybody in the polygraph business wants to endorse basically would permit any employee to be fired for simply refusing to take the test.

Now, I am very concerned about that, and I am concerned about the injustices that can arise, that really you cannot even foresee at this particular point. And if I am right, or Dr. Raskin is right, that there are somewhere between 50,000 and 250,000 people who are badly treated as a result of polygraph improperly administered or for any other reason, defective polygraph examinations, that is a figure that is unacceptable to me as chairman of this committee, and as a person concerned with workers' rights in this country today.

But I appreciate both of you coming and testifying here today. We appreciate the time you have put forth.

Senator Dodd.

Senator **DODD**. Mr. Chairman, if I could, I know you want to get along to the other witnesses.

But, Dr. Saxe, I wonder if you might comment on the infallibility issue, the importance of infallibility, that is, the perception of infallibility on the part of the person taking the test.

Dr. **SAXE**. Yes. It is my judgment that in a polygraph test the physiological data do not indicate whether the person is lying or not. What you have is a situation—the person is put in a situation—where they are told, "We can tell if you are lying or not; we can tell if you are truthful or not." If a subject believes that, and they believe that the machine—the instrument—can detect whether they are truthful or not, they will in fact, if they attempt to be dishonest, show some kind of nervous reaction. Some kind of anxiety reaction.

A polygrapher will give at the beginning of a test, when it is done for a specific incident, a thing called a "stim test". Sometimes it is a card trick, where they demonstrate how they can tell which card the subject has. That is a way of demonstrating to the subject that the polygraph test works.

Unfortunately, the more information that is available about the polygraph, whether it be our OTA report, articles in the newspaper and so on, the more information that becomes available about the mistakes that the polygraph makes is going to increase the number, particularly of innocent people, who are found deceptive. That is one of the things that has me very concerned.

Senator **DODD**. Well, couldn't the reverse also be true—if there is more publication, more notice about the fact that it is not infallible, that the person taking the test will realize that they can probably get away with more than they would like, so that the end result is—I assume that some news show, maybe it is "60 Minutes" or one of these programs, is actually going to do a segment, a widely viewed show that will probably indicate, rightly or wrongly—I am sure that people disagree—that these machines are not infallible. To the extent that a potential subject of a polygraph begins to believe that it is not infallible, then the reliability of those tests, of course, decreases substantially.

Dr. SAXE. I am concerned in the private sector, as well as in the government sector, about dishonest people. Whether the people are using drugs, or stealing, or passing information to unauthorized sources, I am concerned about their being missed by polygraph tests. I believe that what are called countermeasures can be used to defeat the test. The best one is just not believing in the efficacy of the machine, and that is going to result in a lot of guilty parties being exonerated by the polygraph.

The CHAIRMAN. Thank you, Senator Dodd.

Thank you both for being here.

Mr. TALLEY. Thank you, Mr. Chairman.

Dr. SAXE. Thank you, Mr. Chairman.

The CHAIRMAN. Our final panel today represents polygraph users, and we are very happy to have them here.

On the panel are: William Scheve, Jr., president of the American Polygraph Association; Herb Matthews, representing the American Trucking Association; Donald Zale, chairman of the board of Zale Corp., who will be representing several business organizations, and Robert Ostrovsky, representing the Gaming Industry and Nevada Resort Associations.

Mr. Scheve, we will begin with you and go from there. I have to limit each of you to 5 minutes or less, if you can. I would appreciate that, and we will put your complete statements in the record and we will pay a lot of heed to what you say.

Please go ahead.

## STATEMENT OF WILLIAM SCHEVE, JR., PRESIDENT, AMERICAN POLYGRAPH ASSOCIATION, WASHINGTON, DC; HERBERT R. MATTHEWS, AMERICAN TRUCKING ASSOCIATIONS, KEY LARGO, FL; DONALD ZALE, CHAIRMAN OF THE BOARD, ZALE CORP., ON BEHALF OF JEWELERS OF AMERICA, AMERICAN RETAIL FEDERATION, AND NATIONAL RETAIL MERCHANTS ASSOCIATION, IRVING, TX; AND ROBERT A. OSTROVSKY, GAMING INDUSTRY ASSOCIATION OF NEVADA, INC., AND NEVADA RESORT ASSOCIATION, RENO, NV

Mr. SCHEVE. Thank you, Mr Chairman.

I appreciate the opportunity to testify before your committee today, to present the views of the American Polygraph Association on this legislation.

My name is William J. Scheve, Jr., and I am president of the American Polygraph Association. This is a nonprofit, technical, professional and educational organization, representing thousands of individual and corporate members.

The legislation being debated in the Congress has special urgency for the thousands of employers we serve, and for our members. The polygraph is increasingly respected as an important component of public and private sector investigations. The accuracy rate is in the range of 90 percent when used by a competent examiner. The polygraph examination has been shown to be a most valuable, effective, and credible investigative tool for employees and employers alike.

There are countless examples of polygraph examinations playing a key role in protecting the innocent employee, in reducing and in some cases even eliminating internal losses, and in helping to create a safe, secure workplace.

In my testimony today, I would like to address three issues: First, the APA's standards for the polygraph industry; second, the issue of States' rights, and third, the need for good legislation to untie the tangled knot that the House of Representatives has created regarding polygraph regulation.

The American Polygraph Association has strict moral, ethical and professional standards of conduct for our members. We consider our primary responsibility to be to the person who is taking the examination, and our pledge to protect the confidentiality of examination results. We are forbidden from allowing considerations of race, religion, politics, union activity, or economic status to play any part in our examinations.

The suggestion has been made that Government examination should be allowed because of the implication that Government examiners differ from examiners practicing in the private sector. This just is not the case. I am representative of any number of former Federal and State polygraph examiners who now work in the private sector. My qualifications, equipment and techniques are no different today than when I was conducting examinations for Federal and State Governments.

Nonetheless, we recognize that the potential for abuse exists in the polygraph profession, as it does in any profession, or by any professional who utilizes a diagnostic tool.

The American Polygraph Association would welcome action to ensure that all examiners follow the standards that the APA and the Federal Government set for examiners.

Thirty-one States already license and supervise polygraph examiners, just as they do other professions. If the Federal Government decides to regulate the administration of polygraph examinations, it should do so by establishing recommended standards and guidelines for the polygraph profession and by strongly encouraging all States to adopt them. States like Utah, Illinois, Texas, and California all have regulatory systems. They have proven that regulation can take care of abuse, while allowing businesses that need polygraph testing to continue to use it.

Last June, the House of Representatives passed an amendment indicating that the polygraph is a valuable investigative tool. This amendment required expanded use of the polygraph by the Department of Defense to protect our national security. H.R. 1524 and S. 1815, in contradiction to this, would forbid most companies from using the polygraph technique, but would exempt certain industries. These exemptions set up a pattern of arbitrary discrimination among businesses. The operators of nursing homes can use the polygraph to protect patients against the liability of potentially abusive employees. But the operators of apartment buildings with elderly tenants, people just as vulnerable as nursing home residents, cannot use the polygraph to protect residents against crimes that employees might commit.

Those who work at banks cannot be asked to take a polygraph examination, but guards transporting funds in armored cars can.

How is it possible to decide which companies matter to the health and safety of America and which companies do not?

To compound these flaws, the House bill leaves employees in the exempt industries exposed to the rare but still unfortunate possibility of polygraph abuse. These people would have no bill of rights, no assurances that the tests are given by competent examiners using high-quality equipment, no protections at all.

We want to work with this committee and the Senate to develop guidelines that will ensure that the highest standards for polygraph examiners and polygraph testing are instituted and maintained nationwide.

Thank you very much for inviting me to testify today. I would be happy to answer any questions that you might have.

The CHAIRMAN. Thank you, Mr. Scheve.

[The prepared statement of Mr. Scheve and responses to questions submitted by Senator Quayle follow:].

Testimony of William J. Scheve, Jr.

President, American Polygraph Association

Before the Labor and Human Resources Committee

United States Senate

April 23, 1986

Mr. Chairman, I appreciate the opportunity to testify before your Committee today to present the views of the American Polygraph Association on this legislation. My name is William J. Scheve, Jr., and I am president of the American Polygraph Association. This is a non-profit technical, professional, and educational organization representing thousands of individual and corporate members and tens of thousands of this nation's work force involved in the administration of the polygraph technique.

The legislation being debated in the Congress has special urgency for the thousands of employers we serve and for our members. It could virtually abolish our profession as a private sector industry.

For more than 50 years, the polygraph technique has demonstrated its value as an investigative tool. Our equipment and training have become more and more sophisticated over these decades. The polygraph is increasingly respected as an important component in public and private sector investigations. The accuracy rate is in the range of 90% when a competent examiner using properly calibrated equipment is able to reach a conclusion based upon test readings.

In my testimony today, I would like to address three issues:

- First, the APA's standards for the polygraph industry;
- Second, the issue of states' rights; and
- Third, the need for good legislation to untie the tangled knot that the House of Representatives has created regarding polygraph regulation.

The American Polygraph Association has strict standards for ethical practice and for training and education of examiners. We promote continuing education for members. We also fund research projects at leading universities, including a polygraph research center at Michigan State University.

The APA demands the highest standards for polygraph examiners and the equipment they use. We know that only through these standards can we assure the greatest accuracy in our tests. It is a fundamental premise that polygraph test results are only as good as the polygraph examiner. We have developed these strict standards for ourselves over the years because we know that the integrity of our profession depends upon the integrity of individual examiners.

The APA's standards and principles of practice demand high moral, ethical, and professional conduct. We consider our primary responsibility to be to the person who is taking the examination. We are required to discharge our duties with complete impartiality, dignity, and respect. We are forbidden from allowing considerations of race, religion, politics, union activity, or economic status to play any part in our examinations. We are pledged to issue an objective and unbiased report and to protect the confidentiality of the examination results.

The APA School Accreditation Committee examines the curricula and instructional staffs of polygraph schools. It also inspects their physical facilities and equipment at periodic and unannounced intervals to ensure APA standards are being met.

We maintain and enforce these high standards for our many members, yet we recognize that a number of practitioners who are not affiliated with organizations such as ours may choose not to follow a competent examiner's standards of practice.

The suggestion has been made that government examinations should be allowed because of the implication that government examiners differ from examiners practicing in the private sector. That just isn't the case. I am representative of any number of former federal and state polygraph examiners who now work in the private sector. My qualifications are no different today than when I was conducting examinations for federal and state governments. I use the same kind of equipment, the same techniques, and my standards are identical.

The American Polygraph Association would welcome action by the Congress to ensure that all examiners follow the standards that the APA and the federal government set for examiners. We believe that substitute legislation similar to that introduced in the House by Congressmen Young and Darden could meet this challenge.

Such an alternative approach could not only establish these standards, but do so in a manner that respects states' rights--bringing me to my second point.

We believe that the states should license and supervise the administration of polygraph examinations. Such state legislation could ensure that only competent, properly trained, and ethical individuals conduct polygraph examinations.

The states are the most appropriate entities to provide these assurances to their citizens. We believe that the states have proven their ability and have the constitutional right to effectively regulate the licensing and standards of the many professions that impact upon the welfare of their citizens. Only the states have the flexibility to fine tune the regulations to fit the needs of their citizens.

At least 31 states have already taken the initiative to enact legislation affecting licensing and polygraph use in their states. We would suggest that if the federal government decides to regulate the administration of polygraph examinations, that it do so by establishing recommended standards and guidelines for the polygraph industry and by strongly encouraging the states to adopt them.

A regulatory approach such as this would establish the training criteria that competent examiners consider to be essential for the proper administration of all polygraph examinations.

Federal standards and guidelines could also address issues such as appropriate instrumentation, proper examination procedures, and the necessity for effective enforcement policies. The employers' use of polygraph examination results could also be addressed. We believe that by adopting these standards, coupled with our suggestions for continuing education and professional affiliation, citizens and employers alike would be assured that tests would be both fair and accurate.

We recognize that in the polygraph profession the potential for abuse exists, as it exists with any profession or by any professional who utilizes a diagnostic tool. That is the reason that we support an approach that sets minimum federal standards, encourages states to enforce them, and holds examiners accountable for abuses.

The polygraph examination has been shown to be the most valuable, effective, and credible investigative tool available to employers and employees alike. There are countless examples of polygraph examinations playing a key role in protecting the innocent employee, in reducing and in some cases even eliminating internal losses, and in helping to create a safe, secure workplace.

This brings me to my third point, namely the need for a carefully considered body of polygraph regulations rather than a ban on all private sector testing. States like Utah, Illinois, Texas, and California all have regulatory systems. They have proven that regulation can take care of abuse while allowing businesses that need polygraph testing to continue to use it.

Last June, the House of Representatives passed an amendment indicating that the polygraph is a valuable investigative tool. This amendment required expanded use of the polygraph by the Department of Defense to protect our national security. But last month, the House said the polygraph should not be used in the private sector. It passed a bill that would forbid companies from using the polygraph to help guard the health and safety of their customers, employees, and assets. However, the following industries were exempted from the ban:

- any government contractor with defense or national security responsibilities
- employees with direct access to controlled substances
- employees of power plants, public water supply facilities, and other utility companies
- security service personnel
- armored car guards
- security system installers
- uniformed or plain clothes security personnel
- nursing home and day care center personnel

These exemptions set up a pattern of arbitrary discrimination among American businesses. The operators of nursing homes can use the polygraph to protect patients against the liability of potentially abusive employees. But the operators of apartment buildings with elderly tenants--people just as vulnerable as nursing home residents--can't use the polygraph to protect residents against crimes that employees might commit; those who count and receive monies may not be requested to take a polygraph examination, but a guard transporting those funds in an armored car can be required to participate in such an examination.

During the debate in the House, one member of Congress said that the small business owner with the biggest personal stake in his or her company is likely to be the only one affected by the ban because everyone else will have successfully lobbied to be exempt.

How is it possible to decide which companies "matter" to the health and safety of America and which don't? What about airlines and multi-national companies that need to protect our country and citizens against espionage and terrorism? What about employees of chemical plants? Could they not do as much harm to our citizens as a misguided power plant employee? What about banks and financial institutions? Someone with access to computers could embezzle hundreds of thousands of dollars from depositors.

To compound these flaws, the House bill leaves employees in the exempt industries exposed to the rare but still unfortunate possibility of polygraph abuse. These people would have no bill of rights, no assurances that the tests are given by competent examiners using high quality equipment--no protections at all.

Federal, state and local governments, as well as American businesses have demonstrated through their increasing use of polygraph testing that the polygraph technique is needed, that it is most often administered in a fair, equitable, and non-discriminatory manner, and that it works.

We want to work with this committee and the Senate to develop legislation that will ensure that the highest standards for polygraph examiners and polygraph testing are instituted and maintained nationwide.

What is needed is a carefully developed body of state law and federal guidelines to govern the administration of the tests. What is not needed, required, or appropriate, is a ban on polygraph testing for the private sector.

Thank you very much for inviting me to testify today. I would be happy to answer any questions that you might have.

**AMERICAN POLYGRAPH ASSOCIATION**

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May 7, 1986

The Honorable Orrin G. Hatch
Senate Committee on Labor and Human Resources
428 Dirksen Senate Office Building
Washington, D.C. 20510
ATTN: Kay Morrell

Dear Mr. Chairman:

In accordance with the requests of your letter of April 30, 1986, enclosed please find my answers to the questions posed by Senator Quayle and the corrected copy of the hearing transcript.

Again, I thank you for the privilege of allowing me to testify. If I may be of any further service, please do not hesitate to contact me.

Sincerely,

William J. Scheve Jr.

WILLIAM J. SCHEVE, JR.
President
American Polygraph Association

WJS:kdg

Incl: a/s

DEDICATED TO TRUTH

QUESTIONS BY SENATOR DAN QUAYLE FOR WITNESSES
HEARING BEFORE THE LABOR AND HUMAN RESOURCES COMMITTEE
UNITED STATES SENATE
APRIL 23, 1986
ON S. 1815

ANSWERS BY WILLIAM J. SCHEVE, JR., PRESIDENT, AMERICAN POLYGRAPH ASSOCIATION

1. When should the federal government regulate hiring and firing?

   ANSWER: As president of the American Polygraph Association I can qualify as an expert on the use of polygraph in the workplace. I have no special expertise on federal regulation of hiring and firing practices. As a citizen I am aware of Title VII and agree with federal regulation to eliminate the various forms of discrimination. The federal government already has more than adequate laws in this area and I cannot see the need for any more. As a general rule, I believe this is a matter for for the states to regulate.

2. When should the regulation of hiring and firing be left to the states?

   ANSWER: My qualifications to answer this question are as previously stated in Question 1. Again, speaking as a citizen, it is my opinion that any further regulation concerning hiring and firing should be left to the states. They are more familiar with local problems and issues and better able to deal with them in a timely manner on a case-by-case basis.

3. Why should the federal government prohibit polygraphs?

   ANSWER: The federal government SHOULD NOT prohibit polygraphs. Based on my own extensive personal experiences and my knowledge of polygraph use in the government and private sectors, there is no doubt in my mind that the polygraph technique in the hands of competent and ethical examiners is one of the most effective investigative tools available to our society today. Unfortunately, there are some examiners who are inadequately trained and some who are unethical. They are the primary sources of the complaints that are sometimes heard about polygraph. Inadequate training and unethical behavior on the part of a few are issues that can be addressed and solved without eliminating completely an extremely valuable investigative tool.

4. Isn't the real question improper use of polygraphs and not that they are all bad?

   ANSWER: Yes, that appears to be the real issue and one about which the American Polygraph Association has been concerned for many years. All members of the APA are required to abide by the APA Code of Ethics and Standards and Principles of Practice, a copy of which is attached for your review. The APA also maintains formal grievance procedures for handling any complaints that are lodged against its members. If after proper investigation such complaints prove to be valid sanctions are available, up to and including expulsion from membership. I believe that minimum federal standards for competency and professional ethics can be established and then administered and enforced by the states.

5. Do you favor the exemptive approach to the use of polygraphs?

   ANSWER: No, I do not. As I indicated in my oral testimony, the polygraph technique is either a valid and reliable technique or it is not. If it is not then no one should be allowed to use it. If, as I know it to be the case, it is, then everyone should be allowed to utilize the technique to their advantage.

6. Why should exemptions be permitted for some industries and businesses and not others?

   ANSWER: Exemptions are a form of recognition by its critics that the polygraph technique is in fact valid and reliable. Therefore, if it is good for some, it should be good for all. As already mentioned, the real issue is the abuses of the polygraph technique. These abuses can be handled effectively through appropriate regulation primarily at the state level.

7. If polygraphs are "all bad" why should the Department of Defense be permitted to use them? Why should the intelligence and counterintelligence agencies of the federal government be permitted to use polygraphs if they are unreliable?

   ANSWER: The obvious answer is that polygraph is not "all bad" and it is not unreliable in the hands of a properly trained and experienced examiner. Anyone with any real objectivity knows that the polygraph technique is one of the most reliable and successful investigative tools we have.

8. If polygraphs are so unreliable, why should day care centers and nursing homes be permitted to use them?

   ANSWER: As I indicated in my answer to Question 7, the polygraph technique is not unreliable. In the hands of properly trained and experienced examiners, it is one of the most reliable and successful investigative techniques in existence today.

9. The states currently regulate whether employees can be fired or not hired for:
   refusing to work with hazardous substances;
   refusing to be sterilized;
   for being a volunteer fireman;
   filing a workman's compensation claim;
   being a whistleblower;
   wage garnishment or assignment;
   receiving a summons to do jury duty;
   having AIDS;
   refusing to contribute to a group health policy;
   refusing a drug or alcohol test

   I would like the witnesses to comment on each of these categories and whether they believe there should be federal regulation of each one.

   ANSWER: Again, as president of the American Polygraph Association, I have no special expertise regarding most of these subject areas. However, as a private citizen it is my opinion that all of of these areas are best handled by the states. They are more familiar with local problems and issues and better able to deal with them in a timely manner and in accordance with local needs. I would like to make a specific comment regarding the issue of refusing a drug or alcohol test. Because of my concerns for safety on the highway and in the workplace, I don't think that anyone should have the right to refuse a drug or alcohol test without forfeiting their drivers license or their job. It is often a matter of life or death and usually not that of the alcohol or drug abuser. Usually it is the life of an innocent victim. I believe the states are doing a reasonably good job in this area and that there is little the federal government can do to improve the situation.

WJS:kdg

## PREAMBLE

Throughout recorded history one of the great problems faced by man has been the development of a system by which truth may be made known. Approaches to the solution of this problem have ranged from such extremes as the torture chambers of ancient times to the unhesitatingly acceptance in the recent past of the word of a gentleman. Neither approach meets the requirements of today. We respect the dignity of man too much to permit physical and psychological abuse of an individual in a search for truth. Yet, we recognize the enemies of our country, of our society, and of our way of life will lie without hesitation, even under oath, if this will further their purposes.

With the advent of the polygraph we at least have a system, soundly based upon psychology and upon physiology, which is capable, in competent hands, of identifying those who speak the truth in matters of controversy. With this breakthrough an awesome responsibility has developed upon the examiner, whose work may affect the life, liberty and happiness of the person being examined.

The AMERICAN POLYGRAPH ASSOCIATION recognized the enormous potential for good of the use of the polygraph. We pledge ourselves to identifying and eliminating any unqualified persons from our midst. We stand squarely behind the programs to improve the capabilities of our membership through meaningful education, shared experience, progressive research and advanced training. Above all, we dedicate ourselves to fostering and to maintaining the highest ethical standards and principles of practice.

## PURPOSE

The standards of conduct of the society in which we live derived from ethical concepts of right and wrong, exert a powerful influence on every man to do what he believes to be right. So strong and so deeply inbred are those forces that our very physiological processes rebel against deceit and dishonesty, thus providing a technique for scientifically determining truth.

Fortunate indeed is he who, being accused or suspected of misconduct, is able to produce credible witnesses to attest to his innocence.

Now therefore, and be it known henceforth, it shall be the primary responsibility of

THE AMERICAN POLYGRAPH ASSOCIATION

to foster and to perpetuate an accurate, reliable, and scientific means for the protection of the innocent.

to verify the truth----fairly, impartially and objectively----shall be our purpose.

## CODE OF ETHICS

The members of the AMERICAN POLYGAPH ASSOCIATION hold themselves bound, individually and collectively, to the following Code of Ethics:

I. To maintain the highest standards of moral, ethical and professional conduct; to be governed by laws of equity and justice in the performace of all functions.

II. To respect the inherent dignity of all mankind; to deal justly, fairly and impartially with each individual, irrespective of social, politial, racial, ethnic or religious considerations, economic status, or physical characteristics.

III. To discharge professional duties and obligations with independence, dignity and self respect; to keep all decisions and reports scrupulously free from any personal, financial, political, fraternal, social or other extraneous influences.

IV. To refrain from false or misleading advertising; to accept no remuneration for services rendered unless such be fair and reasonable; to decline to represent knowingly both sides of an area at issue, except by express permission of those concerned, given after a full disclosure of the facts; to represent with undivided fidelity.

V. To refrain from express or implied public criticism of any member of the AMERICAN POLYGRAPH ASSOCIATION, except as may be required by due process of law, placing the welfare and advancement of the Association and the polygraph profession above personal desires and ambitions.

VI. To recommend for membership in the AMERICAN POLYGRAPH ASSOCIATION only those persons who are believed to be fully qualified for the class of membership for which they are applying; who subscribe completely to the moral and ethical standards and Principles of Practice of the Association; and who will strive in every way to be a credit to the polygraph profession.

VII. To support to the best of their ability the professional goals of the AMERICAN POLYGRAPH ASSOCIATION: to support scientific research in the polygraph field; to contribute to better community relations; through work and deed to elevate the status of the polygraph profession.

## STANDARDS AND PRINCIPLES OF PRACTICE

In order to achieve unity of purpose, to assure a clear concept of obligations to each other and the profession and to provide for the continuing welfare and protection of the general public, all members of the AMERICAN POLYGRAPH ASSOCIATION have agreed to abide by the following Standards and Principles of Practice:

1. A member shall recognize the fact that his primary responsibility must be to the person who has volunteered for a polygraph examination, regardless of the circumstances which created the need for the examination.
2. (Amended 8/4/82). Recognizing that a polygraph examination cannot be conducted on a person against his will, no member will attempt to conduct an examination when he has reason to believe the examinee has been subjected to coercion or duress.
3. (Amended 6/75-8/76). No member shall initiate an examination on any person unless he uses an instrument which makes a permanent simultaneous recording on a moving chart or at least three (3) physiological tracings, the pneumograph, the cardiosphygmograph and the galvanic skin response. This shall not preclude the recording of additional physiological phenomenon on the same charts. No member shall conduct an examination on an instrument wherein the manufacturer has not supplied information for self-calibration and sensitivity standards for that instrument. Every member shall calibrate his instrument periodically and keep a record of the dates of calibration. No member shall record any physchological or physiological phenomenon with an instrument or any of part of an instrument without the subject being aware that their physiological or psychological phenomenons are being recorded. The provisions of these paragraphs shall be subject to such additional indices as may be required to comply with any State or Federal licensing regulation.
4. No member shall conduct an examination on any person whom he believes to be physically or psychologically unfit for testing. In case of doubt as to the propriety of administering a test in any given situation, the member shall seek expert guidance from a competent medical or psychological authority prior to testing.
5. (Amended 8/5/81). No member shall render a conclusive verbal or written decision or report based on chart analysis without having collected at least two charts in which each relevant question is asked on each chart.
6. No member shall terminate a polygraph examination without affording the examinee a reasonable opportunity to explain and to eliminate any reactions which are evident on the charts. Further, no member shall accept the explanation of the examinee for a chart response without verification.
7. No member shall, unless professionally qualified to do so, include in any written report any statement purporting to be a medical, legal or psychiatric opinion of which would infringe upon areas under the cognizance of professionals in those fields. This shall not preclude the examiner from describing the appearance or behavior of the examinee, if this is pertinent to the examination, as long as the examiner refrains from offering any diagnosis which he is professionally unqualified to make.
8. A member shall not conduct an examination where he has reason to believe the examination is intended to circumvent or defy the law.
9. A member shall not conduct an examination where he has reason to believe the examination is intended to interfere with or to prevent the lawful organizational activities of a labor union.
10. A member shall not solicit or accept irregular fees, gratuities, or gifts which may be intended to influence his opinion or decision. Further, no member shall set a fee for professional polygraph services contingent upon the findings or results of such

services; nor shall he increase any initial fee as a direct result of his findings during any polygraph examination.

11. A member shall not knowingly issue or permit his employees to issue a polygraph examination report which is misleading, biased or falsified in any way. Each polygraph report shall be a factual, impartial and objective account of the pertinent information developed during the examination and the examiner's professional conclusion, based on analysis of the polygraph charts.
12. A member shall be guilty of gross negligence if it be proven that he did not, in fact, obtain data reported as factual in any polygraph report. Further, it shall be deemed highly unethical for any examiner to express verbally or in writing a test conclusion which is based soley upon subjective opinion of personal assumption. This does not preclude a professional judgment based on analysis of the polygraph charts, in the absence of substantive admissions by the examinee.
13. A member shall not publish nor cause to be published any false or misleading advertisements relating to the polygraph profession.
14. A member shall not offer testimony concerning the charts or conclusions presented by another member unless he is thoroughly familiar with the techniques and procedures used by the other member. This paragraph shall not prohibit a member from testifying concerning his independent examination of the same examinee.
15. Any person who is convicted of a felony or a crime involving moral turpitude shall be ineligible for any class of membership in the AMERICAN POLYGRAPH ASSOCIATION.
16. A member shall abide by decision and recommendations offically adopted by the AMERICAN POLYGRAPH ASSOCIATION at any regularly scheduled meeting.
17. (Adopted 8/10/78). To protect the privacy of each examinee, no member shall release information obtained during a polygraph examination to any unauthorized person. Authorized persons shall consist of the following:
    a. The examinee and persons specifically designated in writing by the examinee.
    b. The person, firm, corporation or governmental agency which requested the examination.
    c. The Membership and Grievance Committee of the AMERICAN POLYGRAPH ASSOCIATION or similar committees of other polygraph organizations.
    d. Members of governmental bodies such as Federal, State, County or Municipal agencies which license, supervise or control the activities of polygraph examiners.
    e. Other polygraph examiners in private consultation.
    f. Others as may be required by due process of law.
18. (Adopted 8/13/80). A member shall not inquire into the sexual conduct or preferences of a person to whom a polygraph examination is being propsed or administered unless pertinent to an alleged crime specifically at issue in the examination, or where such inquiry is directly and demonstrably related to job performance qualification. In such case excepted herein, the areas of inquiry shall be specifically made known and agreed to in advance by the examinee or prosepctive examinee.

A member shall not aid or abet a person in violation of this provision, nor willfully become an accessory to such a violation before or after the fact.

19. (Adopted 8/13/80). A member shall not include in any polygraph examination questions intended to inquire into or develop information on activities, affiliations or beliefs on religion, politics or race; except where there is specific relevancy to an investigation, or where terrorism or subversion is involved.

## CONSTITUTION AND BY-LAWS

### ARTICLE I - NAME

The name of this organization shall be the AMERICAN POLYGRAPH ASSOCIATION, hereinafter referred to as the APA.

### ARTICLE II - OBJECTIVES OF THE APA

The objectives of the APA shall be to advance the use of the polygraph as a profession and as a means of promoting social welfare by the encouragement of the use of the polygraph in its broadest and most liberal manner; by promotion of research into instrumentation and techniques; by the improvement of the qualifications of polygraph examiners through high standards of professional ethics, conduct, education and achievement; to unify polygraph examiners throughout the world and rekindle their interest in the use of the polygraph and in the APA; by the increase and diffusion of polygraph technology through meetings, professional contacts, reports, papers, discussions and publications; thereby to advance scientific, professional, and public acceptance of the contributions of polygraph techniques to the promotion of the public welfare and to keep the APA informed of member sentiment and urge the membership's active participation in civic and community affairs where the polygraph is concerned; and to publicize the name and prestige of the APA.

### ARTICLE III - MEMBERSHIP AND VOTING RIGHTS

A. There are seven (7) classes of membership: Member, Intern, Associate, Affiliate, Honorary, Life and Corporate. (Amended 1/74-8/75 and 8/77-8/78).

1. MEMBER

To qualify for full privileges and standing as a member, the applicant must meet the following requirements:

a. The applicant must have completed a course of formal instruction in polygraph instrumentation and techniques at a school (civilian, military or governmental) that is fully recognized and accredited by the APA at the time of his/her attendance. (Adopted 8/78).

b. The applicant must have administered at least 200 polygraph examinations within a three year period following completion of formal instruction.

c. The applicant must have demonstrated proficiency in the conduct of polygraph examinations to the satisfaction of the Membership Committee.

d. The applicant must possess, as a minimum, a degree at the baccalaureate level from a college or university accredited by the Regional Accreditation Board.

The **Chairman**. We will turn to you, Mr. Matthews.

Mr. **Matthews**. Thank you, Mr Chairman.

I am Herbert R. Matthews, president of Benton Bros. Film Express, a medium-size general commodity trucking company serving Georgia and Florida.

Mr. Chairman and members of the committee, I am here today representing the American Trucking Association, the national association of the trucking industry, to express the motor carrier industry's strong opposition to the proposed ban on the use of polygraphs in S. 1815.

It is our industry's as well as my own personal belief from experience that the public safety of our Nation's highways will be sorely compromised without the use of the polygraph as a preemployment screening tool.

S. 1815 would run counter to the tremendous efforts to improve truck and highway safety currently underway by the Department of Transportation in partnership with the trucking industry here and across the country.

Our trucks log over 138 billion miles per year on the Nation's roads; 24 hours a day, 7 days a week. Consider the types of cargo we carry: 250,000 shipments of hazardous materials per day; 45,000 shipments of arms, ammunitions, explosives, and chemical weapons per year We also carry the bulk of controlled drug shipments and high-value items such as computers.

Finally, our drivers have direct access to millions of homes, businesses, and military establishments all over the country.

The safety of American highways, the national security, and security of property are at stake if polygraph use is banned.

The application process is inadequate to reveal, because there is no national driver's license. Bad drivers can spread their poor driving record over many licenses without fear of detection. That is very important.

Likewise, alcohol and drug abuse, which is a severe problem for our industry, cannot be identified by traditional means. Undetected theft from previous employers, terrorist connections, and other relevant information is not disclosed by any other source. The polygraph is an effective tool in justifiably probing all of these areas.

As a matter of fact, sir, in my own company, of those who falsify the employment applications, 50 percent do so because of drug problems, and 32 percent do so because of alcohol problems. These individuals represent the most serious threat to public safety. Yet, without the polygraph, they would be driving my trucks on the highways in Georgia and Florida.

No one wants to place an 80,000-pound truck in the hands of a wreckless driver, a drug addict or a criminal, especially one carrying hazardous or sensitive cargo.

ATA strongly urges the committee not to take away an important safety tool that helps prevent this from happening. If S. 1815 is enacted, we believe an exemption for the motor carrier industry is necessary in the national interest.

Mr. Chairman, I have supplied a detailed written statement for the record, which I believe provides a compelling case for an exemption for the trucking industry.

I thank you, and I would like to add one comment. I heard Congressman Pat Williams coin a new word this morning: "gadget." In my opinion, every American in the United States ought to write him a note and say, "Thank God for the 'gadget.' "

Thank you, sir.

The **Chairman**. Thank you, sir.

[The prepared statement of Mr. Matthews follows:]

*Before the*

UNITED STATES SENATE
COMMITTEE ON LABOR
AND HUMAN RESOURCES

APRIL 23, 1986
WASHINGTON, DC

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*Statement of the*

# AMERICAN TRUCKING ASSOCIATIONS
*On*
# S.1815 - EMPLOYEE POLYGRAPH PROTECTION ACT

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**Herbert R. Matthews**
President, Benton Brothers Film Express

# ATA POLYGRAPH TESTIMONY

## I. INTRODUCTION

Mr. Chairman and members of the Committee on Labor and Human Resources.

I am Herbert R. Matthews, President of Benton Brothers Film Express, an interstate motor carrier of general commodities with significant operations in Georgia and Florida. I am here today, representing the American Trucking Associations, to present the views of the trucking industry on the important issues involved with the use of the polygraph.

ATA is the national trade association of the trucking industry. Through its 51 affiliated trucking associations located in every state and the District of Columbia, 11 affiliated conferences, and several thousand individual motor carriers, ATA represents every type and class of motor carrier in the country: for-hire and private; regulated and exempt.

The American trucking industry provides an essential transportation service to the largest economy in the world. It is, in fact the largest form of transportation in the country, employing more people and handling more freight than any other mode.

Each year, five million trucks, operated by thousands of truck drivers, log more than 138 billion miles on our nation's highways, interacting with the motorist on a seven-day per week, 24-hour basis, every day of the year.

It is vital to the nation's welfare, and the trucking industry's responsibility to the American public, that we hire the best drivers possible. Our drivers must have good driving records, no patterns of drugs and alcohol abuse or other problems which could compromise the safety of our nation's roads and jeopardize the lives of millions of our citizens.

The trucking industry receives 77% of the revenues collected for all freight carried in the United States. The cargo we carry includes: 250,000 shipments of hazardous materials per day; controlled drug substances, high-value items such as computers, as well as general commodities of all types. We are also the largest carrier of highly sensitive materiel involving national security for the Department of Defense, hauling thousands of shipments of arms, ammunition, explosives, and other defense-related items. The security of this vast amount of freight is dependent on honest, reliable, and trustworthy drivers.

Finally, our drivers have direct access to the homes, as well as businesses of America. Each year, thousands of Americans move their households through the services of a major segment of the trucking industry - the nation's movers. Naturally, we are concerned that the individuals, who by their occupations, freely enter our country's homes and are entrusted with valuable personal possessions, do not have past conduct which should legitimately be of concern.

In short, the trucking industry and its employees play a unique role in the safety of Americans -- on the road and in their homes, in national security, in the delivery of important cargo such as hazardous materials and drugs, and in transporting most of the nation's freight safely and secure from theft.

Accordingly, the trucking industry is vitally interested in any legislation which affects its hiring procedures and personnel policies. The polygraph plays a key role in helping to assure the hiring of high-quality professionals. Thus, we appreciate the opportunity to state our opposition to S. 1815, the Polygraph Protection Act of 1985, which would prohibit the use of the polygraph or similar devices by virtually all private sector employers.

## ~~II.~~ THE NATURE OF TRUCK OPERATIONS

A brief description of the trucking industry and of typical motor carrier operations may assist the Committee in understanding the importance of the polygraph as both a pre-employment tool and in theft investigations. The trucking industry includes both for-hire and private carriers. The for-hire sector includes common carriers serving the shipping public at large and contract carriers who have arrangements with specific shippers. Private carriers comprise that segment of the trucking industry made up of retailers, manufacturers and others which transport their own goods or supplies.

Basic for-hire motor carrier operations are less-than-truckload, truckload, and household goods movements. A less-than-truck-load or LTL operation involves the gathering, transporting, and distributing of shipments, often made up of dozens of individual packages. Briefly, the carrier sends out a local driver to pick up shipments from several shippers. The shipments are then taken to a carrier's terminal where dock workers sort them by destination and consolidate them with other shipments going to the same point. The shipments are then transported to the destination where they are re-sorted and loaded into local delivery trucks for delivery along with shipments to other consignees along a specific route.

In comparison, a typical truckload operation involves the dispatching of an over-the-road vehicle to a single shipper's facility. There the truck is loaded with the freight of that shipper destined to a single destination or it may have several drop-off points. In truck-load operations, the driver usually goes directly from the shipper's facility to the delivery point, checking in with the carrier by telephone at points along the way.

You are all probably more familiar with the third type of operation -- that of a household goods mover. Household goods carrier employees have the most direct contact with the private individual. They enter your homes and they handle your most valuable and dearest possessions. They are usually responsible for packing, loading, transporting, unloading, and often unpacking your personal goods. Most of this activity takes place in the confines of your own home.

All three types of motor carrier operations are supported by crews of mechanics -- responsible for the safe maintenance of the millions of trucks operating on the highways; and dispatchers -- responsible for the scheduling, routing, and overseeing of the operation of the vehicles.

In a majority of operations, a particular vehicle may have a load consisting of commodities and goods as diverse as guns, toasters, and drugs. Similarly, an individual driver may be driving a truckload of explosives or similar shipment for the Department of Defense on Monday and return with a load of tires for a commercial shipper on Tuesday. The nature of the industry allows few companies to dedicate their equipment or personnel to the carriage of specific commodities or service to a specific shipper. Further, a common carrier must, under law, transport all commodities tendered to it so it cannot, for example, accept toasters and not accept guns or drugs.

The key employees to motor carrier operations, of course, are the drivers. Unlike employees in many industries, truck drivers are essentially unsupervised in the course of their work on the road, operating independently and on their own. Because of the nature of trucking operations, as I have described, all of a company's drivers must be qualified and trusted to carry the entire range of commodities to be transported. Under these conditions, the quality of the individual hired is especially important.

The importance of a quality driver is underscored by the fact that the industry interacts with 160,000,000 other motorists day-in and day-out, all year long. Further, truck drivers have direct access to almost every business, factory, retail outlet, warehouse, military establishment and at some time -- home in America.

## III. THE TRUCKING INDUSTRY'S ESSENTIAL NEED FOR THE POLYGRAPH

The trucking industry has always made highway safety a priority issue. Since deregulation, in 1980, there have been more truck operators using the highways. With a rising accident rate in the past two years, ATA has put even more emphasis on highway safety issues. We must keep all the current tools that help achieve safe roads, including the polygraph, and we are seeking to obtain whatever new ones we can.

Since 1940, the trucking industry has had comprehensive standards to help motor carriers evaluate abilities, character and personality traits of each job applicant. These standards consist of applications for employment, driving record checks, past employment reference checks, and structured interviews. They establish a system of fact finding and analysis to determine that the job applicant who will be hired can do the job safely, honestly and effectively. The standard provides the means for weighing human accomplishments and human failings in relation to the requirements of the job. In 1971, the Federal government adopted similar standards that are applicable as regulatory requirements for motor carriers to assure that employers check out a driver applicant's license record, traffic violations record, past employment history and accident record.

However, the industry standards and the Federal regulatory requirement are limited in their effectiveness. Prospective employees can hide poor driving records and accidents, drug and alcohol problems, and involvement in criminal activity, theft, gambling, and other relevant employment factors which are not detected through traditional employment screening. They can do this by falsifying or omitting information, or because they have not been caught in past thefts or drug/alcohol usage. Unreported accidents and undetected thefts and drug abuse will not show up in any record available to an employer.

Detailed reference checks are inadequate to identify these important issues. Our carriers report that former employers are often reluctant to verify anything about a prospect except the dates of his employment. Therefore, the polygraph has proven to be a valuable tool in identifying negative traits and problems crucial to an employment decision where the public welfare is at stake.

## A. Highway Safety Concerns

### 1. Multiple License Problem

Because we do not have a national drivers license system in place, truck drivers can easily obtain more than one driver's license, unbeknownst to employers and regulators. Then the driver can spread traffic violations among the licenses and hide a poor driving record. A 1981 study sponsored by the National Highway Traffic Safety Administration and conducted by the American Association of Motor Vehicle Administrators estimates that from 10 to 32% of the groups of truck drivers surveyed, an "unacceptably high level," have more than one license. Often, the multiple licensing problem is brought to light through truck accident investigations which show that a driver's poor traffic record was spread among so many licenses that it never became bad enough in any one state to trigger suspension or revocation. In other cases, drivers were found to have lost their privileges in one state, but were continuing to drive on a valid license obtained from another state.

In 1980, the National Transportation Safety Board published a report on the multiple licensing problem based on its investigation of 44 commercial drivers involved in serious accidents. The report showed that the drivers had a total of 63 licenses, 98 suspensions, 104 accidents, and 456 traffic convictions.

The Board concluded that, "...in spite of three levels of commercial driver screening -- the NDR (National Driver

Register), state driver licensing policies, and screening by motor carriers pursuant to Federal regulations, problem commercial drivers continue to be licensed by the states and employed by motor carriers to operate heavy trucks and other commercial vehicles."

As I mentioned earlier, there is no national commercial driver's license or a data bank that can identify applicants with multiple licenses. However, the polygraph can help get at this important area of inquiry as well as undisclosed speeding and reckless driving, unreported accidents and similar matters. When such information is revealed, the employer can look further into the applicant's fitness for employment.

## 2. Drug and Alcohol Abuse Problems

The abuse of drugs and alcohol is a national problem. While we have no reason to believe that the trucking industry is more susceptible to this problem than other industries, because of the dangers that drivers under the influence of alcohol or drugs pose to the public, we are greatly concerned that the employees we hire are drug free and do not have histories of substance abuse. While current laboratory tests may be able to identify recent use of alcohol and drugs, the polygraph can be used to help identify deep-rooted problems and long-term histories of abuse or dependencies.

Consider just a few examples of polygraph results on some prospects who had passed senior management interviews with one of our carriers. I would like to stress these candidates voluntarily gave this information with no deception indicated. Under questioning, one applicant admitted using speed 5,000 times in his life along with occasional uses of marijuana, hashish, and cocaine. Another admitted using marijuana 5,000 times in his life as well as other drugs. Copies of the examiners' reports in these instances are attached. Carriers are not interested in turning away a 30-year old applicant who used drugs as a teenager or who has an occasional drink. We are very concerned about individuals with chronic problems, such as those indicated in these examples, who could be maintaining or driving an 80,000 lb. truck, especially one of the hundreds of thousands of loads of hazardous materials or explosives.

### B. National Security Concerns

Of equal importance is the fact that the motor carrier industry is the nation's largest transporter of goods for the Department of Defense. The industry handles more than 45,000 DOD shipments of arms, ammunitions and explosives -- weighing over 430,000 tons -- including shipments of missiles and similar armaments annually. Motor carrier drivers have direct access to major military bases and defense establishments. The trucking industry plays a highly important role, therefore, in the security of our nation.

When such goods are being transported on public highways, they are most susceptible to hijacking and theft. In view of the increasing threat of terrorism, the Defense Department has recently taken action to strengthen the security requirements for motor carrier shipments of sensitive arms, ammunition and explosives. These protective services include dual drivers, carrier-provided armed guards, escort vehicles, and constant surveillance, a procedure under which the vehicle must be under the constant observation of a motor carrier employee. Since the effectiveness of these security precautions depends, in the final analysis, upon the quality of the individuals who are required to implement them, it is essential that motor carrier employers be permitted to use every available means, including polygraphs, to help ensure that the individuals entrusted with sensitive DOD shipments are responsible, honest, drug-free, and loyal.

The experience of one of the largest motor carriers for the Department of Defense best illustrates the carriers' need for the tool in pre-employment screening. For economic reasons, the carrier discontinued pre-employment use of the polygraph for one year and found its accident rate escalating. The carrier reinstated the use of polygraph examinations in its pre-employment screening and found itself returning to its previous good safety record.

We believe that the excellent safety record of the motor carriers who haul freight for DOD has resulted, at least in part, from the ability of motor carrier employers to use the polygraph examination. The proposed ban on the use of polygraphs by motor carrier employers will have a detrimental effect on national security.

C. Household Goods Carriers

Another sector of the motor carrier industry, to which the availability of polygraphs is very important, is the household goods carrier. In the process of providing personalized moving services for individual consumers, moving company employees are given direct access to over a million private residences every year, spending from a few hours to several days with families packing, moving, and unpacking. Implicit in the effective performance of these individualized transportation services is a high degree of trust placed in household goods movers by their customers, for personal safety and the security of personal possessions.

A very positive aspect of the polygraph is its availability as an investigative tool to protect honest employees who may be accused or implicated in allegations of wrongdoing, but who have no other way to show their innocence than by offering to take a polygraph. While this aspect of polygraph testing applies to all carrier employees, the need for protection is perhaps greatest in the moving industry where there is more personal direct contact with consumers. Movers report that polygraph testing has been extremely helpful in clearing their employees after allegations of theft or other wrongdoing are made by a consumer. One example given by a moving company involved a shipment of household goods owned by two customers, one of whom accused the mover's employees of stealing money from a purse. After the results of the polygraph tests supported the employees' denial of the allegations, the investigation was broadened. It was finally determined that the other customer rather than the driver or packers had taken the money. Without the use of polygraph testing, the employees in that situation may not have been able to clear their reputation.

The use of polygraphs in the moving industry is important to the protection of both the consumer who allows the carrier employees into his or her home and the employees who may stand accused of acts they did not commit.

## D. Theft Prevention and Investigation

Another major problem facing the trucking industry is the prevention of theft. Theft of goods from motor carriers -- from the pilferage of small items from damaged cartons to the hijacking of entire truckloads -- amounts to over seven billion dollars annually. This is an enormous continuing problem of concern to both carriers and shippers. Industry representatives believe this figure would be considerably higher without the use of polygraphs.

Shippers entrust their goods to motor carriers in much the same manner and with the same expectation as we entrust our monies to banks. The carrier in turn must rely on the honesty and reliability of its employees who, as I indicated earlier, move goods on their own without physical supervision or control.

Theft is not only a major concern because of the number of dollars involved but also because of the important nature of much of the cargo the trucking industry carries. The trucking industry is involved in virtually every movement of drugs, including controlled drugs in the United States. The pilferage of shipments of guns and explosives, whether civilian or military, hazardous materials, and the like are not only economic issues but involve public safety and security as well.

The pre-employment screening of employees to determine whether they have histories of theft or other dishonest tendencies, as well as the availability of polygraphs for investigations of theft, is an important tool in theft prevention. The mere fact the polygraph is available is a significant deterrent to employee theft.

The polygraph is often the only way to uncover such tendencies. For example, carriers report that prior to or during a polygraph examination many applicants admit thefts from former employers ranging from small to large items, such as furniture, that were undiscovered or unsolved.

The vulnerability of shipments to theft by employees where the polygraph is unavailable is underscored by an example cited by Congressman Roukema in the House debate on H.R. 1524. The Macheros, a Puerto Rican terrorist group, were able to plant a member of their group as a Wells Fargo armored car driver who robbed $8 million from the firm. Since the guard had no prior criminal record, the only way of detecting his motives would have been through the polygraph, which was unavailable due to state law restrictions.

The trucking industry moves valuable and sensitive freight of all types as we have indicated above. The polygraph is needed to prevent theft and identify wrongdoers should theft occur.

## IV. THE MOTOR CARRIER INDUSTRY OPPOSES A BAN ON POLYGRAPH EXAMINATION BY PRIVATE INDUSTRY EMPLOYERS

ATA, for all the reasons stated above, opposes S. 1815, which would ban use of the polygraph, a tool which is essential to the fulfillment of the trucking industry's obligations to public welfare, national security, and other responsibilities. Our need for its use are equally as great as those of all levels of government whose millions of workers are exempt from the ban; and the security, nursing home, day care and other industries exempted in the House bill, H.R. 1524.

The trucking industry strongly supports the civil rights of its employees and prospective employees. Accordingly, we support legislation which would eliminate or minimize any abuses that may be occurring at the present time. For example, we would support a law which: regulates the qualifications of a polygraph operator; prohibits the asking of questions irrelevant to the employment sought and disallows employment actions based solely on the results of a polygraph examination.

However, if S. 1815 is enacted, as is, we believe that it should contain an exemption for the trucking industry because of the nature of truck operations and of the cargo which is transported by trucks. The legislation provides exceptions for the government sector and others. These exceptions are allowed because they directly impact on the national security, public health and safety of the nation.

We believe that a need for a similar exception for the trucking industry has been demonstrated as essential for national security and public health.

## V. CONCLUSION

ATA urges this Committee to either reject S. 1815 and leave the matter to the states to determine or to enact legislation which regulates but does not ban polygraph use. If the Committee decides to recommend enactment of S. 1815, we urge that it provide for an exemption from the provisions of the bill prohibiting the use of polygraphs, for the motor carrier industry.

EXAMINATION DATE
2/3/86

RECOMMENDATIONS
High Security Risk

EXAMINATION RESULTS
No Deception Indicated

EDUCATION
8th grade completed; , NC

MILITARY SERVICE
None

CLIENT LOCATION
/ Transfer

BIRTH DATE

MARITAL STATUS
Divorced

SOCIAL SECURITY NUMBER

EMPLOYMENT HISTORY.

1 year, 10 months: 3/84-1/86 — .1 Trucking, Driver, Wade, N.C. Left when they went out of business.
2 years: 1982-1984 — Transport, Wilson, N.C. Driver. Left because [illegible]
1 year, 5 months: 1/80-4/82: / Transfer, Rocky Mount, NC. Driver. Terminated - truck stolen

"ALL IDENTIFYING FACTORS HAVE BEEN DELETED FROM THIS REPORT"

TERMINATIONS Transport, Express

NARCOTICS USE

Used marijuana 2 times in last 30 days; last time: last night (2/2/86)
Used marijuana 5 times in past 12 months.
Used marijuana 30 times in life.
Used hashish 1 time in life: last time 1983
Used cocaine 1 time in life; last used 11/85.
Used speed 5,000 times in life; last used 1/86.
Sold speed (6 months ago last time). Total sold in life: $100.00.

THEFT FROM PREVIOUS EMPLOYERS

- oranges (6 crates [illegible]).
, - washing powder [illegible]

GAMBLING/DRINKING HABITS

Occasionally gambles. Poker (10c stakes). Lottery ($1.00 stakes)
Spends approximately $15.00/year on alcoholic beverages. Has never used during working hours.

CONVICTION HISTORY.

Non-support 1984
Careless and reckless driving 1982
Worthless check 1979

License Suspended 1984 - MD - failure to pay tickets; 3 weeks.
1983 - MD - failure to pay ticket; 3 weeks.

GENERAL COMMENTS

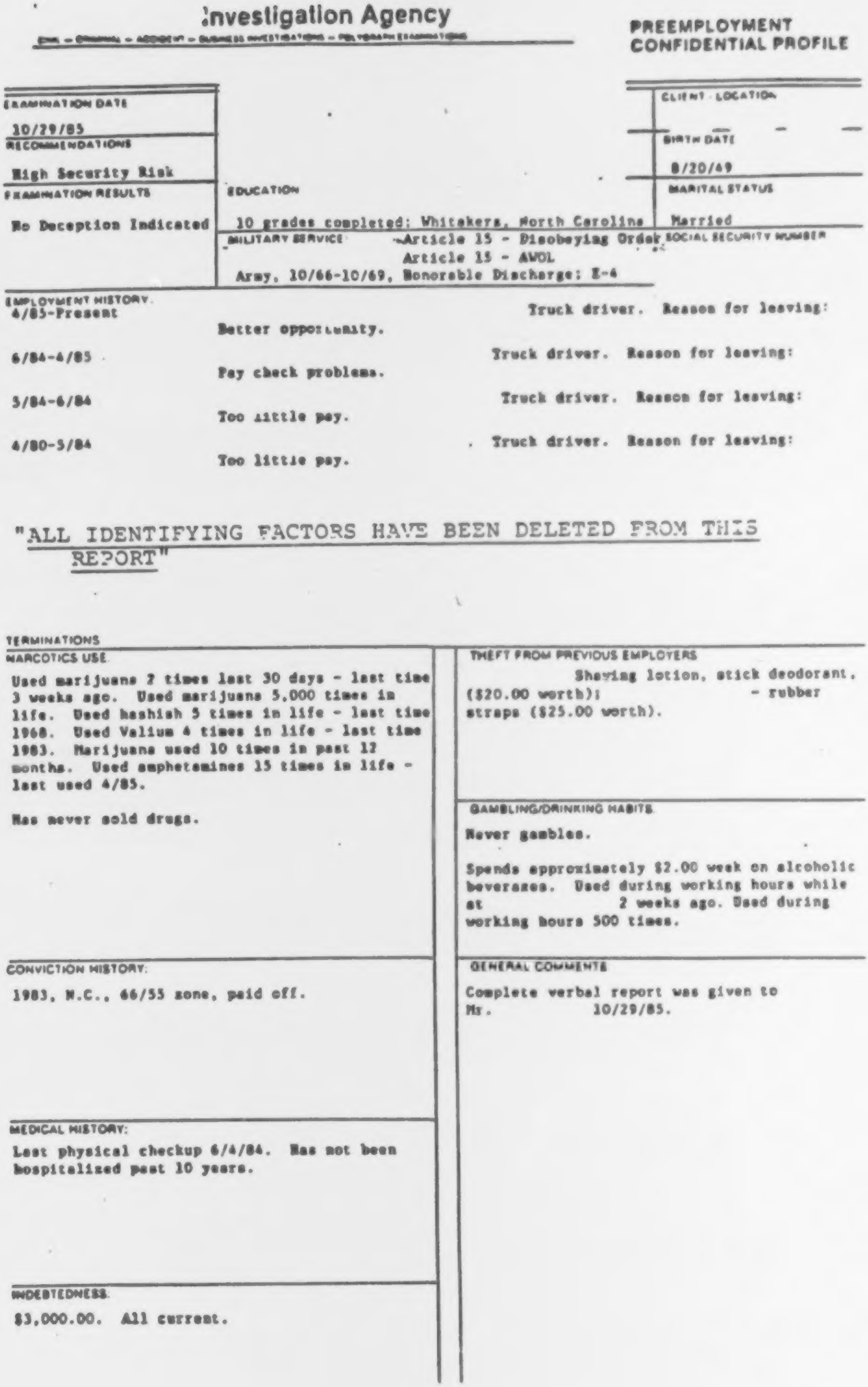
Complete verbal report was given to Mr. on 2/3/86.

MEDICAL HISTORY.

Last check-up 1985 summer.

INDEBTEDNESS

$4,000.00 Past due $75.00 furniture payment.



Investigation Agency

CIVIL – CRIMINAL – ACCIDENT – BUSINESS INVESTIGATIONS – POLYGRAPH EXAMINATIONS

PREEMPLOYMENT
CONFIDENTIAL PROFILE

**EXAMINATION DATE**
10/29/85

**RECOMMENDATIONS**
High Security Risk

**EXAMINATION RESULTS**
No Deception Indicated

**CLIENT · LOCATION**

**BIRTH DATE**
8/20/49

**MARITAL STATUS**
Married

**EDUCATION**
10 grades completed; Whitakers, North Carolina

**MILITARY SERVICE**
Article 15 - Disobeying Order
Article 15 - AWOL
Army, 10/66-10/69, Honorable Discharge; E-4

**SOCIAL SECURITY NUMBER**

**EMPLOYMENT HISTORY**

4/85-Present Truck driver. Reason for leaving: Better opportunity.

6/84-4/85 Truck driver. Reason for leaving: Pay check problems.

5/84-6/84 Truck driver. Reason for leaving: Too little pay.

4/80-5/84 Truck driver. Reason for leaving: Too little pay.

"ALL IDENTIFYING FACTORS HAVE BEEN DELETED FROM THIS REPORT"

**TERMINATIONS**

**NARCOTICS USE**

Used marijuana 7 times last 30 days - last time 3 weeks ago. Used marijuana 5,000 times in life. Used hashish 5 times in life - last time 1968. Used Valium 4 times in life - last time 1983. Marijuana used 10 times in past 12 months. Used amphetamines 15 times in life - last used 4/85.

Has never sold drugs.

**CONVICTION HISTORY:**

1983, N.C., 66/55 zone, paid off.

**MEDICAL HISTORY:**

Last physical checkup 6/4/84. Has not been hospitalized past 10 years.

**INDEBTEDNESS:**

$3,000.00. All current.

**THEFT FROM PREVIOUS EMPLOYERS**

Shaving lotion, stick deodorant, ($20.00 worth); - rubber straps ($25.00 worth).

**GAMBLING/DRINKING HABITS**

Never gambles.

Spends approximately $2.00 week on alcoholic beverages. Used during working hours while at 2 weeks ago. Used during working hours 500 times.

**GENERAL COMMENTS**

Complete verbal report was given to Mr. 10/29/85.

The CHAIRMAN. Mr. Zale, we will turn the time over to you.

Mr. ZALE. Mr. Chairman and members of the committee, I am Donald Zale, chief executive officer of Zale Corp., a publicly owned specialty retailer. We have been in business for approximately 62 years, and have over 1,500 stores, employing approximately 15,000 people.

I am here today on behalf of the American Retail Federal, the National Retail Merchants Association, the National Mass Retailing Institute, the Jewelers of America, the American Watch Association, the Manufacturing Jewelers & Silversmiths of America, which together comprise more than 1 million businesses across America.

I will try to keep my remarks brief, and ask that my written statement be entered in the record.

The CHAIRMAN. Without objection.

Mr. ZALE. While we oppose S. 1815 as presently drafted, we want to emphasize our desire and commitment to work with the members of the committee and the Senate to enact legislation that strikes a reasonable balance and fairly limits the use of polygraphs. Like personal interviews, credit checks, and employee evaluations, the polygraph is an investigative tool that requires human judgment. And, like other tools, the polygraph is not infallible. The fact is, however, that when push comes to shove, the polygraph is the most effective means available to investigate instances of serious criminal conduct, including espionage, child abuse, drug abuse, fraud and theft.

At Zale, for example, we have used the polygraph for more than 20 years. It is our corporate policy to administer polygraph examinations to employees on a nondiscriminatory basis, including all corporate officers.

In fact, I took my most recent polygraph in January of this year.

Inventory losses due to employee theft have reached truly epidemic proportions in the United States, which amount to billions of dollars per year. At Zale, we feel that the availability and the use of the polygraph, because of which we were able to recover money and merchandise during the past 3 years valued in excess of $5 million—this does not count the losses entirely avoided in the first instance by being able to hire generally competent and honest employees. Other savings include reduced insurance costs and employee turnover. All of these result in better prices for American consumers.

The use of the polygraph by Zale and the companies I represent today is not simply a question of dollars; it is a matter of public trust.

Zale, like a number of other companies, is publicly held. Its obligations are to its shareholders and employees, many of whom through profit-sharing and pension plans, have a direct stake in the company.

We also have important obligations to our customers to ensure that when they enter our stores, they will be reasonably free from harm to their person or property. Retailers have similar obligations when they routinely send people into your homes for service, sale and installation.

In addition, we have obligations to our suppliers to pay our bills, and to our customers to maintain reasonable prices.

To force businesses to abandon entirely the use of the polygraph is to call into serious question our ability to maintain our corporate responsibilities. I am proud to say that Zale does maintain a daycare center at its Dallas headquarters to take care of the youngsters of our employees. Like others employed in sensitive areas, members of the staff must take a polygraph examination. I believe the parents of the children have the right to expect that we use the best and most effective means available to ensure that no member of this staff is an abuser of children. Just as we should take reasonable steps to ensure that childcare centers will not be staffed by child abusers, so should drug companies be able to ensure that their products will not be handled by dope addicts, and other companies in our industry be able to ensure that jewelry and other valuables held in trust will not be left with thieves.

In the jewelry and watch industry, we deal with highly valuable, concealable and easily transportable items that range from unfinished gems to complete products. I have here in my hand, Senator, $1 million worth of diamonds. Although this is not something I would ordinarily do, I made an exception to illustrate to you that merchandise of this kind is easily transported—we do not need your trucks, Mr. Matthews.

The CHAIRMAN. That is a pretty small package there.

Mr. ZALE. You bet.

The CHAIRMAN. Why don't you lift it up and show the people in the back, as well as myself.

Mr. ZALE. I cannot move them around too much. [Laughter.]

The CHAIRMAN. It looks awfully good to me, is all I can say. [Laughter.].

Mr. ZALE. You can trust me—they are there.

This property does not belong to me. How do I fulfill my obligation to insure that access will be limited to employees that are trustworthy? Should we engage in more expensive, intrusive, and less reliable private investigations of job applicants? Should we take the completed job application at face value? The results, I am afraid, could be catastrophic for our industries.

Should we be required to hire squads of detectives and police for each of our individual retail stores, or should we place each of our employees with access to valuable products under constant surveillance?

Should salesmen and other employees who need to leave the premises with valuables be allowed to venture outside only with an escort?

These alternatives are expensive, constantly intrusive, and entirely unsatisfactory.

Admittedly, where human judgment is a factor, mistakes will occur. However, I believe that the relative incidence of such mistakes is far outweighed by the benefits of polygraph.

Senator, we need more than a kneejerk reaction. We must have as our goal not only responsive but, more importantly, responsible legislation. That legislation does not consist, in our view, of a blanket prohibition of polygraph in the employment context.

As I stated at the outset, we are here to try and find a solution. We hope that you will let the groups I represent work with you to strike that proper balance.

Thank you for the opportunity to appear, and I would be pleased to answer any questions that you or other members may have.

The **Chairman**. Thank you so much.

[The prepared statement of Mr. Zale follows:]

# BEFORE THE COMMITTEE ON
# LABOR AND HUMAN RESOURCES
# UNITED STATES SENATE

Testimony of Mr. Donald Zale, Chairman of Zale Corporation, on behalf of the Jewelers of America, Manufacturing Jewelers and Silversmiths of America, American Watch Association, American Retail Federation, National Retail Merchants Association and National Mass Retailing Institute on S. 1815 "The Polygraph Protection Act of 1985"

April 23, 1986

Mr. Chairman and members of the Committee, I am Donald Zale, Chairman and Chief Operating Officer of Zale Corporation, a publicly owned specialty retailer of precious jewels, fashion jewelry, watches, gold, silver and crystal. We have been in business for 62 years, and presently have 1500 stores employing more than 15,000 people.

I am here today on behalf of the American Retail Federation, the umbrella organization for retailing, representing in excess of one million stores; the National Retail Merchants Association, an organization of more than 3700 companies representing approximately 45,000 leading chain, department and specialty stores; the National Mass Retailing Institute, a trade association representing over 100 members operating 15,000 stores; the Jewelers of America, a national trade organization of more than 12,000 retail jewelers; the Manufacturing Jewelers and Silversmiths of America, representing 2400 jewelry manufacturers; and the American Watch Association, a trade association of approximately 40 companies engaged in the importation, assembly and manufacture of watches and watch movements here and abroad. More detailed descriptions of these organizations and their members have been provided to the members of the Committee under separate cover.

While we unequivocally oppose S. 1815 as presently drafted, we recognize the need for balanced and effective federal legislation in this area. We therefore wish to emphasize our desire and commitment to work with members of the Committee and Senate to enact legislation that strikes a reasonable balance, and reasonably and fairly limits the use of the polygraph examination.

Like personal interviews, credit checks and employee evaluations, the polygraph examination is an investigative and evaluative tool that requires certain physical components and human judgment. And, like these other tools, the polygraph is neither infallible nor immune to instances of abuse. While, as you have heard today, the opponents and proponents of polygraph use disagree as to the scientifically established validity and reliability of polygraph testing, the fact is, that when push comes to shove, the polygraph is the most effective tool available to us to investigate instances of serious criminal conduct, including espionage, child abuse, drug abuse, fraud and theft.

It is for this reason that members of Congress have endorsed polygraph use when the stakes are highest. And it is for this reason that the polygraph is so widely used by businesses and organizations throughout the United States in screening and evaluating employees and job applicants. Indeed, it has been estimated that at least one-half of all retail trade firms and 20 percent of all major corporations administer polygraph tests to employees.

At Zale, for example, we have used the polygraph in pre-employment evaluations, periodic examinations and investigations of incidents of criminal conduct for more than 20 years. Our polygraph examinations are given by qualified examiners and generally last less than one hour. The nature of the questions are reviewed in advance by our lawyers and other professionals in order to minimize any possibility of abuse or impropriety, and every individual at our company is provided the opportunity, at his or her option, to take a second examination. We keep the results of all examinations strictly confidential. Moreover, it is our corporate policy that our polygraph examinations are administered to employees on a non-discriminatory basis, including all officers of the company.

In fact, I took my most recent polygraph examination in January of this year.

The businesses that I represent today can testify to the serious losses that the polygraph prevents and the very substantial cost savings that it generates for employers, employees and consumers. Inventory shrinkage due to employee theft has reached truly epidemic proportions in the United States, and is estimated to be in excess of 40 billion dollars per year. At Zale, we feel that due to the availability and use of the polygraph we were able to recover money and merchandise during the past four years valued at more than $2 million. This does not count the losses entirely avoided in the first instance by being able to hire generally competent and honest employees. Other significant savings to which I can attest include reduced insurance payments and reduced employee turnover. All of these result in better prices for American consumers.

It bears emphasis, however, that the use of the polygraph by Zale and the companies we represent is not simply a question of dollars -- it is a matter of the public trust. Zale, like a number of those companies I represent today, is publicly held; its obligations are to its shareholders and employees, many of whom, through profit sharing, have a direct stake in the company. Like other retailers, we also have an important obligation to our employees and customers to ensure that when they enter our stores to work or to make a purchase, they will be reasonably free from harm to their persons or property. We have still further obligations to our valued employees to help as many of them as we can to keep and advance in their positions and to minimize the fallout from illegal actions in the work place to those who have perpetrated them. In addition, we have obligations to our customers to maintain reasonable prices and to minimize losses. To force business to abandon entirely the use of the polygraph is to take away our ability to pinpoint the most serious kinds of criminal conduct by individuals in the midst of our businesses and to call into serious question our ability to maintain our corporate responsibility.

I am proud to say that Zale maintains a day care center at its Dallas headquarters to take care of the young children of our employees. We have nearly 100 children entrusted to our care, who are supervised by a staff of approximately 15 individuals. Like others employed in sensitive areas, each member of the staff must take a polygraph examination. I believe the parents of every one of these children have the right to expect that we use the best and most effective means available to ensure that no member of this staff is an abuser of children. Just as we should take reasonable steps to ensure that child care centers will not be staffed by child abusers, so should drug companies be able to ensure that their products will not be handled by dope addicts, and other companies in our industry be able to ensure that jewelry and other valuables held in trust will not be left with thieves. For the business community, I would submit that there simply is no alternative to the reasonable and judicious use of the polygraph examination in this regard.

In the jewelry and watch industry, for example, we deal with highly valuable, concealable and easily transportable items that range from rough unfinished gems to complete products. A handful of diamonds can be worth $1 million or a salesman's watch sample case worth several hundred thousand dollars. This property does not belong to me; how do I fulfill my obligations to those who have an interest in it that access will be limited to employees who are trustworthy?

This same problem is faced by the business interests I represent today. Should we, in making hiring decisions, engage in more expensive and intrusive private investigations and employ investigators to perform extensive background checks on job applicants, including personal interviews of their neighbors, family, friends and others? Our industries are labor intensive; in attempting to hire competent and honest employees, should we take the completed job application at face value? The results, I am afraid, could be catastrophic for our industries.

The results would also be unfortunate in terms of lost job opportunities. With the use of the polygraph, it is no longer necessary to hire only individuals whom we know personally, or who come to us through business colleagues or personal acquaintances. Instead, through the professional administration of polygraph examinations, which usually take less than one hour, we have been able to make many jobs available to segments to our society who otherwise may not have had the opportunity to obtain such employment.

We have an interest in offering meaningful job opportunities and increasing employee satisfaction. We don't want to have to limit our hiring ability. We invest significant amounts of time and effort in our hiring practices and the use of polygraph examinations in order to draw from as broad a pool as possible competent and honest individuals who will have a future with our company and our customers.

Consider, for a moment, our other alternatives in the work place. Should we hire squads of detectives and police for each of our individual retail stores or should we place each of our employees with access to valuable products under constant surveillance? Should salesmen and other employees who need to leave the premises with entrusted valuables be allowed to venture outside only with an escort? For our industries, these alternatives are expensive, constantly intrusive and entirely unsatisfactory when you are trying to run a business.

The use of polygraph examinations thus enables us to avoid the far more intrusive and less effective procedures in investigating and, we believe, preventing particular incidents of employee theft or other criminal conduct. It also enables employers like Zale, with respect to particular incidents, to overcome the innuendo, suspicion and doubt that usually arise as a result of such incidents and accurately to determine the source of a problem while exculpating many of our employees who have a right not to suffer job recriminations, simply because we did not have the tools to pinpoint the culprit.

This is not to say that mistakes do not occur, as they must where human judgment is a factor. There is no question in my mind, however, that the relative incidence of such mistakes is far outweighed by the benefits of the polygraph to American business, the work force and the public that I have briefly noted and personally experienced.

I have been fortunate, in my personal experience at Zale, not to have encountered serious problems with polygraph use. However, we all have been made well aware through the press, in prior hearings on this legislation and today of abuses concerning polygraph examinations. Although it is my understanding that most, if not all, of this egregious conduct already is prohibited or otherwise regulated under federal or state laws, we cannot close our eyes to the fact that it exists and may require further remedial action at the federal level. At the same time, however, we need more than a knee jerk reaction -- we must have as our goal not only responsive but, more importantly, responsible legislation. That legislation does not consist, in our view, of a blanket prohibition on the use of polygraph in the employment context.

As I stated at the outset, we are here to try to find a solution. We hope that you will let the groups I represent work with you to strike that proper balance. Thank you for the opportunity to appear. I would be pleased to answer any questions that the members of the Committee may have.

Mr. **Ostrovsky**. Chairman Hatch, I appreciate the opportunity to address you today regarding S. 1815. My name is Robert Ostrovsky, and I am the director of industrial relations for the MGM Grand Hotel Reno.

I am here today representing the Nevada Resort Association and the Gaming Industry Association of Nevada, trade associations representing gaming licensees within the State of Nevada. The associations oppose S. 1815 and support compromise legislation which was offered in the House, H.R. 3916.

The State of Nevada has a strong licensing procedure administered by the state attorney general's office under which all examinations are conducted. This law provides for the licensing of individual examiners and restricts the type of questions which may be asked, such as matters relating to unionism, sexual relations, and other topics considered to be sensitive with regard to an individual's civil rights.

We believe this procedure is consistent with the philosophy found in H.R. 3916. The gaming industry believes that the polygraph examination has been successful in identifying numerous individuals who through later admissions and other factual analysis of accounting records, have been proven to engage in various types of theft and embezzlement.

The industry has an obligation to the public to continue to provide assurances that all wagers will receive fair and equitable odds against all other wagers. Employee theft, drug usage in the workplace, all can have a negative impact on that obligation. In addition, licensees have a duty to the taxpayers to ensure that all tax revenues are properly collected, recorded, and forwarded to the appropriate governmental agencies.

We also have an obligation under Treasury Department currency transaction reporting requirements which are enforced by Nevada gaming control regulations, which are more stringent than those applied to banks, and polygraph has proven to be a valuable tool in the enforcement of these revenue obligations. We believe that eliminating in the private sector all polygraphs based on the available information is not consistent with good public policy.

It is our belief that a more conservative approach relating to the licensing of examiners, the limitation on the type of questions that may be asked, and a limit on the use of the results of the examination, all of which are in Nevada law, are appropriate areas of consideration as a first step in eliminating any abuse which may exist in the industry.

We believe that the courts have certainly affected the use of all investigative tools in recent decisions relating to wrongful discharge and employment situations. These decisions in and of themselves have made employers more aware of their obligations relative to employee rights and employee contractual relationships. Eliminating polygraph examinations would only add a new burden on employers resulting in a potential for greater theft, drug usage, and the associated cost factors to both business and the consumer.

A review of the industry statistics indicates that the device has been used cautiously and with continued concern for employee rights and has under these conditions been an informative tool in the administration of fair and equitable treatment of casino employees throughout the State.

Attached to my written statement which I have submitted are actual facts and figures on the number of tests given at the MGM Grand Hotel Reno in the years 1983, 1984, and 1985. The summary of those would indicate that 714 tests were given in that 3-year period. They were given to an employee base of about 3,300 employees per year; approximately 10,000 over the 3-year period. Including turnover, there were over 20,000 employees who were subjected to the possibility of being asked to take such an examination; 714 of those individuals were asked; 621 of those people, or 88 percent, passed that examination as good and honest employees. What happened to the other 83 employees who failed or were proven to be deceptive by the examination?

I have taken just for an example here, to use our time better, just the year 1985. Fifteen individuals in that year failed specific examinations. That is, there was some evidence to believe they were exposed or involved in some kind of employee wrongdoing, which resulted in them being asked to take the test. Fifteen of those failed. Five of those people admitted guilt before or after taking the examination and were terminated from their employment. Four were terminated from their employment after other evidence such as accounting records were developed on the basis of the facts brought out in the polygraph examination. Six of those employees who failed the examination were not terminated and are still working today.

It is the position of my company and of most of the industry that the polygraph examination is a tool in long-term investigation of employee wrongdoing, and that it should be used as a tool, and that we should be allowed to have that tool to use, along with videotapes, audiotapes, and observations of accounting records, et cetera, that we use frequently in the gaming industry.

The gaming industry and my employer would urge you to defeat this bill and to consider substitute legislation similar to that in the House, found in H.R. 3916.

Thank you.

The CHAIRMAN. Thank you.

[The prepared and supplemental statement of Mr. Ostrovsky follows:]

# TESTIMONY

# OF

# GAMING INDUSTRY ASSOCIATION OF NEVADA, INC.

# AND

# NEVADA RESORT ASSOCIATION

BY

ROBERT A. OSTROVSKY
DIRECTOR OF INDUSTRIAL RELATIONS
MGM GRAND - RENO

BEFORE THE
SENATE COMMITTEE ON
LABOR AND HUMAN RESOURCES

April 23, 1986

Chairman Hatch and Members of this committee:

I appreciate the opportunity to address you today regarding S. 1815. My name is Robert Ostrovsky, and I represent the Nevada Resort Association and Gaming Industry Association of Nevada, Inc. - trade associations which represent gaming licensees within the State of Nevada. The associations oppose S. 1815 and support the compromise legislation offered in H.R. 3916. Our position paper on the private sector prohibition regarding polygraphs is attached here as Exhibit A.

We believe that the polygraph instrument, used as an appropriate investigative tool and administered by a licensed examiner, provides the employer with a valuable deterrent to employee theft, and effectively removes the stigma of accusation from innocent employees.

The State of Nevada, in Nevada Revised Statute 648 A.080, has a strong licensing procedure administered by the State Attorney General's office under which all examinations are conducted. This law provides for the licensing of individual examiners and restricts the types of questions which may be asked - such as matters relating to unionism, sexual relations, and other topics considered to be sensitive with regard to an individual's civil rights. The industry believes the current system of licensing and controls has worked well in eliminating abuses and providing employees with more than adequate levels of protection against misuse of the polygraph.

A review of the industry's statistics indicates that the device has been used cautiously and with continued concern for employee rights and has, under these conditions, been a informative tool in the administration of fair and equitable treatment to casino employees throughout the State. Exhibit B details the data pertaining to my company which I believe to be representative of similar organizations who use the polygraph in our industry. As the committee can see, only 7% of our work force take a test, and these statistics were taken from a total population of about 10,000 employee jobs. In addition to being an excellent management tool, polygraphs have proven to be extremely beneficial for employees who frequently have requested polygraph examinations in order to absolve themselves of any suspicion or allegations of wrongdoing.

It has been suggested by Congressman Pat Williams in the Congressional Record of Wednesday, March 12, 1986, at H 1047, that the polygraph has not been successfully used within the gaming industry. His remarks were not based on any factual study of the issue nor did he use any empirical data. The gaming industry believes that the polygraph examination has been successful in identifying numerous individuals who, through later admission and other factual analysis of accounting records, have been proven to have engaged in various types of theft and embezzlement. Although a few members of the industry have expressed personal opinions which oppose the polygraph, these same licensees have also effectively used polygraph examinations in their individual gaming properties, and clearly the vast majority of licensees do use polygraphs in administering their obligations under Nevada gaming statutes and regulations.

Gaming nation-wide is an expanding, growth industry and has an obligation to the public to continue to provide assurances that all wagers will receive fair and equitable odds against all other wagers. Employee theft can have a negative impact on that obligation, whether it be due to individuals who engage in slot machine tampering or lottery embezzlement. In addition, licensees have a duty to the taxpayers to ensure that all tax revenues are properly collected, recorded, and forwarded to the appropriate governmental agencies. Employee theft can interfere with this legal requirement.

In the Congressional Record on Wednesday, March 12, 1986, the polygraph was referred to as an unreliable tool, a voodoo craft, un-American, and compared with the dunking stool, the rack, and firing squads. We do not believe that a review of available literature and research would support such a description of the polygraph. In fact we believe, where properly administered, it can provide an important tool needed in protecting the employer, the innocent employee, and the public. We believe that Congressional actions in expanding federal government use of polygraphs is a clear recognition that the test provides valuable information in an investigation of wrong-doing.

A 1980 study by the Central Intelligence Agency found the polygraph to be the most productive of all background investigative techniques.[1] The Office of Technology Assessment ("OTA") study did not suggest that polygraph was inaccurate, rather that there was simply a lack of scientific evidence on the issue. It is important to recognize that the OTA only reviewed the available literature and did not conduct any independent research with regard to pre-employment testing. The Drug Enforcement Agency has also recommended the use of polygraphs for a pre-employment screening and as a subsequent investigative tool where permitted by state law.[2] I do not consider myself an expert in the area of polygraph research and only point out these studies and recommendations to indicate that there are varying opinions as to the usefulness of this investigative tool.

We believe that eliminating in the private sector all polygraphs, based on the available information, is not consistent with good public policy. It is our belief that a more conservative approach relating to the licensing of examiners, the limitation on the type of questions that may be asked, and a limit on the use of the results of the examination, all of which are in Nevada law, are appropriate areas of consideration as a first step in eliminating any abuse which may exist in the polygraph industry.

We also believe that the courts have certainly affected the use of all investigative tools in recent decisions relating to wrongful discharge in employment situations. These decisions, in and of themselves, have made employers more aware of their obligation relative to employee rights and employee contractual relationships.

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[1] Donald Warren, Security Management, October 1984.

[2] Ronald Buzzeo, Deputy Director of the Drug Enforcement Administration before the 25th annual meeting of the Institute of Nuclear Materials Management, July 18, 1984.

Eliminating polygraph examinations would only add a new burden on employers, resulting in the potential for greater theft, drug usage, and other associated cost factors to business and the consumer. The U.S. Chamber of Commerce has indicated that 20% of all business failures each year are a direct result of employee theft, and such internal theft far exceeds business losses due to burglary, shoplifting, arson, and check fraud.[1] Employers need all available tools to stem this tide of potential and real loss.

We urge you to reject S. 1815 and to consider instead legislative steps that would protect employers, employees, and the American consumer. Thank you for your attention, and I would be happy to answer any questions regarding the gaming industry's past use of polygraph and our present position on this and other pending legislation on this topic.

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[1] Chamber of Commerce of the United States, "White Collar Crime" (Washington, D.C., Chamber of Commerce of the U.S., 1974).

EXHIBIT A

## GAMING INDUSTRY ASSOCIATION

## POSITION PAPER

### Polygraphs

In the 1981 session of the Nevada Legislature, legislation was introduced which would have prohibited the use of polygraphs. After lengthy hearings, the assembly amended the bill to provide for the strengthening of licensing procedures called out in Nevada Revised Statues 648A.080. The senate later concurred in these amendments. The intent of this bill was one, a strong licensing procedure administered by the Attorney General's office; and two, spelled out provisions on the type of questions which could be asked relating to private matters including unionism, sexual relations, and other matters considered to be sensitive areas with regard to the individual's civil rights.

The industry believes the current system of licensing and controls has worked well, eliminating abuses and providing employees adequate levels of protection against misuse of the polygraph. We, therefore, urge the defeat of any legislation which proposes to prohibit polygraphs. We would be willing to support legislation which would strengthen current licensing regulations.

The industry further feels that the use of polygraphs provides a strong deterrent to theft and other acts of willful misconduct which adversely affects the industry. Review of the industry's statistics indicates that the device has been used cautiously and with continued concern for employee rights and has, under these conditions, been an informative tool in the administration of fair and equitable treatment to casino employees throughout the State. In addition to being an excellent management tool, polygraphs have proven to be extremely beneficial for employees who frequently have requested polygraph examinations in order to absolve themselves of any suspicion or allegations of wrongdoing.

As an indication of how successful the use of the polygraph can be is the example set at Days Inns, "Six years ago, before we introduced the tests, cash shortages at Days Inns exceeded $1 million per year. During the past five years, losses have been cut to .00138 percent of gross. Industry standards are somewhere between 3 and 5 percent. The polygraph is one of the major contributors (to that decrease)." Further, the National Labor Relations Board has given approval to the use of polygraph tests, "If the tests were given solely to control loss and not to implicate the union, they would not violate the National Labor Relations Act." Given the protections in both Federal Law and Nevada State Law, employees in Nevada are fully protected against the misuse of polygraph exams.

Polygraphs have provided a valuable service to Nevada gaming employers in controlling cash handling and other related matters in Cage, Casino and Slot operations and this valuable tool should continue to be used where properly regulated.

EXHIBIT B

SUMMARY OF 1983 - 85
FOR MGM GRAND - RENO

TOTAL TESTS GIVEN 714

TOTAL TESTS FAILED 83

TOTAL TESTS PASSED 621

TOTAL TESTS INCONCLUSIVE 10

TERMINATIONS RESULTING FROM FAILURES 48

Of total work force

- 7% take test
- .8% fail test
- .5% lose employment

Of those who take test

- 12% fail
- 88% pass
- 51% who fail are terminated

I. Review of 1983 statistics

II. A Company Example

   A. The Company: MGM - Reno

   B. The Policy: Attached

   C. The Statistics:

      1. Screening Tests (Cage, Locksmith, Hard and Soft Count)
         a. 28 tests
         b. 2 failed (Prime Count/Cage Cashier)

      2. Transfer Tests (Cage, Locksmith, Hard and Soft Count)
         a. 20 tests
         b. 1 failed

      3. Specific Tests
         a. 136 tests
         b. 22 failed

      4. Mass Specifics
         a. 132 tests
         b. 22 failed

      5. Totals
         a. 316 tests
         b. 28 failed

   D. Reasons:

      1. For Specific Tests
         a. Money missing from count
         b. Large window shortage
         c. Board of adjustments
         d. Cash shortage (large)
         e. Theft
         f. Verify accusations

   E. Results:

      1. Of 25 specifics failed
         a. 10 admitted guilt (terminated)
         b. 7 not terminated
         c. 8 terminated with other evidence

I. Review of 1984 statistics

II. A Company Example

- A. The Company: MGM - Reno
- B. The Statistics:
    1. Screening Tests (Cage, Locksmith, Hard and Soft Count)
        a. 26 tests
        b. 5 failed (all admitted prior theft from employers)
    2. Transfer Tests (Cage, Locksmith, Hard and Soft Count)
        a. 21 tests
        b. 2 failed (admitted drug use or theft at work)
    3. Specific Tests
        a. 71 tests
        b. 25 failed
        c. 6 inconclusive
    4. Mass Specifics
        a. 54 tests
        b. 0 failed
        c. 2 inconclusive
    5. Totals
        a. 174 tests
        b. 32 failed
        c. 8 inconclusive
- C. Reasons:
    1. For Specific Tests
        a. Drug use/sale at work
        b. Damage company property
        c. Cash shortage (large)
        d. Theft
        e. Verify accusations
- D. Results:
    1. Of 25 specifics failed
        a. 15 admitted guilt (terminated)
        b. 5 not terminated
        c. 5 terminated with other evidence
    2. Of 8 inconclusive
        a. 2 admitted guilt (1 warned, 1 terminated)
        b. 6 not terminated

I. Review of 1985 statistics

II. A Company Example

  A. The Company: MGM - Reno

  B. The Statistics:

    1. Screening Tests (Cage, Locksmith, Hard and Soft Count)
       a. 18 tests
       b. 3 failed (admitted theft or drug use at work)

    2. Transfer Tests (Cage, Locksmith, Hard and Soft Count)
       a. 27 tests
       b. 5 failed (1 admitted drug use, 1 admitted theft)

    3. Specific Tests
       a. 39 tests
       b. 12 failed
       c. 2 inconclusive

    4. Mass Specifics
       a. 140 tests
       b. 3 failed

    5. Totals
       a. 224 tests
       b. 23 failed
       c. 2 inconclusive

  C. Reasons:

    1. For Specific Tests
       a. Drug or alcohol use at work
       b. Cash shortage (large)
       c. Theft
       d. Verify accusations

  D. Results:

    1. Of 15 specifics failed
       a. 5 admitted guilt (terminated)
       b. 6 not terminated
       c. 4 terminated with other evidence

    2. Of 2 inconclusive
       a. 1 for medical reasons (not terminated)
       b. 1 received warning

MGM GRAND HOTEL · RENO

·NAME: ______________________________________
Print LAST FIRST MIDDLE

SOCIAL SECURITY NO.: ______________________________

## STATEMENT OF COMPANY POLICY

MGM believes that with respect to a limited number of job classifications involving the handling of large amounts of cash, the use of polygraph tests under strictly controlled conditions provides a quick and reliable method for verification of information furnished on applications for employment and for an annual review of work performance. Therefore, it is our policy to use polygraph tests as an aid in confirming an applicant's qualifications for certain highly sensitive job classifications; for an annual review of his work performance and in special circumstances.

MGM requires its examiners to administer standardized tests to insure that all persons are fairly and equitably tested. The questions will relate solely to job-related areas of concern, no matter where or by whom tested. Prior to the test persons tested will be advised concerning matters that will be covered by the test.

The test results and answers will not be used in any crinimal proceedings.

## STATEMENT OF APPLICANT

With full knowledge and understanding of the above, I hereby declare that:

I do voluntarily consent to undergo a Polygraph test prior to my employment.

If I am hired, I voluntarily consent to undergo a Polygraph test on an annual basis or in special circumstances.

______________________ (Signature of Witness)

______________________ (Signature of Applicant)

______________________ (Date Signed)

2500 East Second Street · Reno, Nevada 89595 · (702) 789-2000

# SUPPLEMENTAL REMARKS

OF

# GAMING INDUSTRY ASSOCIATION OF NEVADA, INC.

AND

# NEVADA RESORT ASSOCIATION

BY

ROBERT A. OSTROVSKY
VICE PRESIDENT OF HUMAN RESOURCES
BALLY'S GRAND - RENO

BEFORE THE
SENATE COMMITTEE ON
LABOR AND HUMAN RESOURCES

May 15, 1986

Mr. Chairman and Members of this Committee:

Various questions were posed during my testimony in opposition to S. 1815, and Senator Quayle has sent several written interrogatories concerning the hearing. I believe my written testimony and answers to the questions clearly articulate the policy of the Nevada Resort Association ("NRA"), Gaming Industry Association of Nevada, Inc. ("GIA"), and the gaming industry in Nevada.

The State of Nevada actively regulates the use of polygraph examinations within the State. The parameters set forth in H.R. 3916 generally parallel the safeguards found in Nevada law. Regulation of polygraph use and examiners should be a matter left to the sovereign states.

Employment within the gaming industry in Nevada is not an automatic right - rather it is a privilege. Gaming licenses and "work cards" are granted by the State and enforced by the State Gaming Control Board concerning corporations and individuals in this industry. The polygraph has evolved as one of many investigative tools so that the industry and the State can ensure that patrons and visitors are not cheated. Sometimes state regulators request that our licensees (corporations) polygraph their own employees.

Casinos are not Safeway stores. Unlike the Safeway, casinos have no inventory other than cash on hand. Therefore, inventory controls suitable for grocery stores are not applicable to Nevada resorts. The cash is counted and recorded in the count room which is one or two steps beyond the patron's transaction. There is no inventory to measure against cash on hand; therefore, traditional control methods are not appropriate.

Nevada has a unique industry which requires different laws and regulations from other more traditional industries. The industry for over fifty years has developed for its patrons a system and product which must be desirable and honest. Polygraph examinations are necessary tools for us to ensure the integrity of our product.

The CHAIRMAN. I have a lot of questions I could ask this group, and I respect each of you, but let us assume that the testimony we have had, even from the propolygraph experts, has indicated that polygraph examinations can be faulty a percentage of the time; that much depends on the examiner, much depends on the length of time, much depends on the quality of analysis.

If we could come up with language in this bill that would permit polygraph examinations, but would require standards in all of those areas, would you be supportive of that type of legislation?

Mr. Scheve.

Mr. SCHEVE. Yes, sir. We need the standard.

Mr. MATTHEWS. The American Trucking Association would, yes, Senator.

The CHAIRMAN. Well, we have had evidence here today from witnesses who testified for your organization that a 15-minute polygraph examination is not really a polygraph examination, and that it may take much more time and have to be much more considered than some of the things that have been going on.

I might point out, Mr. Ostrovsky, that New Jersey bans the polygraph, as I understand it, so the gaming industry in New Jersey does not have the benefit of this, and they seem to be doing just fine.

Mr. OSTROVSKY. That is correct. The New Jersey——

The CHAIRMAN. They do have a method of enforcement in the gaming industry that is unheard of in other private industry.

Mr. OSTROVSKY. What would that be, Senator? I am sorry.

The CHAIRMAN. Maybe I had better not repeat that. [Laughter.]

Mr. OSTROVSKY. But you will note that the House amendment was put forward by Congressman Hughes, who represents the State of New Jersey, and would have exempted the gaming industry. I think it is a clear indication that in New Jersey there is some consideration about expanding polygraphs to the gaming industry, and the amount of losses and the kinds of currency transactions we do are sort of the unaccountable.

Unfortunately, Mr. Wynn testified that there are good records at Safeway about what goes through that register, and you can balance that against an inventory. That is very difficult to do in the casino industry.

The CHAIRMAN. I understand. I have had a lot of meetings with businesspeople about this issue. I was really frankly shocked about how widespread is the use of polygraph examinations, especially short-duration polygraph examinations. I have really been kind of concerned about it.

I have also had top businesspeople come in and say, "We would like to have the right to use it, but we do realize there are two sides to this question and that there are some abuses that really need to be corrected." Now, that is what I am concerned about, and I can tell you that I am not sure which direction to go, but I do lean very heavily toward this bill and the very stringent outlawing of polygraph examinations, unless we could come up with some language that really assures a resolution of these problems and assures the fairness in the workplace that presently does not exist, in my opinion.

So I will dwell a great deal on your testimony and any other information you care to provide for me. I have been very appreciative of the business community in trying to enlighten us on why this is so important for them and I have been absolutely shocked at the widespread drug use when people apply for employment in this country, drug and alcohol abuse—and even in my own State, where people would like to believe there is less drug and alcohol abuse than other areas. It is very, very significant and very impressive to me that these are major problems that business has to confront.

Yes, sir, Mr. Matthews.

Mr. MATTHEWS. Senator, if I may make one final statement. We are not in the business of not hiring people. We cannot run a company unless we have people to work for us and do the things that have to be done. The thing that we need is a tool of this nature to help us screen those people who are not capable of doing the job we want done—driving those trucks safely; not being on drugs, not being on alcohol; not stealing from fellow employees as well as the company. We want to hire people, but we want to hire good people, and this is one of the tools we have with which to accomplish that.

The CHAIRMAN. I understand. I understand that argument, and it is a fair argument.

Mr. MATTHEWS. So, please do not take it away from us.

The CHAIRMAN. Well, it is a fair argument. On the other hand, there is a lot of unfairness in the present system. Sometimes we have to do what is best under the circumstances. Right now, I have to admit I think there is a lot of unfairness in the way the system is used in this country.

Mr. MATTHEWS. I would like to suggest that maybe you are seeing some isolated cases.

The CHAIRMAN. Well, I will keep looking at it. I will keep looking. I want to keep an open mind on it.

Mr. ZALE. Senator, if I could, I would comment to you that in our particular instance, we find that in States where we have no restrictions on polygraphs, that our inventory losses are approximately 25 percent of what they are in States where we cannot use the polygraph. As you saw, we deal in supercurrency. Now, we do not know where all of those billions of dollars go that are taken from our stores, but you have got to assume that a lot of it does go to support drug habits and other illegal activity.

The CHAIRMAN. Would you be kind enough to submit some documentation to us on that? It might be very helpful to us—or any of the rest of you, also, because we do want to examine to the extent that we can—and I will invite the rest of the business community to participate—the differences between the regulated and nonregulated States, or the States that ban polygraphs versus the States that permit polygraphs and what the relative differences really are.

So, I would like to have that information to the extent that your organizations or anybody affiliated with your organizations could provide it for us.

I can see in each of your cases why you are concerned. I can see why the House put the exemptions in the House bill that it did. On the other hand, on the other side of that coin are 50,000 to 250,000 people who have been badly treated as a result of inadequate or improper polygraph examinations.

Now, Mr. Scheve, you can doubt the 250,000, but I do not think you can doubt the 50,000.

Mr. **Scheve**. I think that is still an assumption based on conditional probability statistics. We do not have any hard and fast information on that at all.

The **Chairman**. Well, you did have evidence here, and I do not think it would be too much rebutted——

Mr. **Scheve**. Oh, there is no doubt——

The **Chairman** [continuing]. That 15 percent of even well-administered polygraph examinations may be inaccurate.

Mr. **Scheve**. In my position as the loss prevention director with a major corporation, I do quality control work on vendors, and I have fired a number of them for abuses because I do quality control checks on our people. There is no doubt that these things go on, and I am absolutely in favor of eliminating these abuses.

The **Chairman**. And I can see that, and I appreciate that, and that has a great deal of influence with me. Thank you.

Senator Pell, shall we go to you, and then we will go to Senator Dodd.

Senator **Pell**. Thank you very much, Mr. Chairman.

I would like to address a question to Mr. Zale. Being the Senator from Rhode Island, we think we are the jewelry capital of America in that industry.

Mr. **Zale**. Yes, sir.

Senator **Pell**. What effect do you think a polygraph ban would have on the jewelry industry?

Mr. **Zale**. We think that it would be very detrimental, Senator, to the jewelry industry and to the employees of the jewelry industry.

Senator **Pell**. Very detrimental, you said?

Mr. **Zale**. Yes, right; if we could not use the polygraph examination as a tool in investigating criminal misconduct, we believe it will have very significant negative impact on our industry.

Senator **Pell**. Do you have any statistics that would demonstrate that the theft rate is less in States which are permitted to do polygraphs and do them, as opposed to States where they do not?

Mr. **Zale**. Yes, sir, we do. We have data which Senator Hatch just asked that we furnish to this committee, and we can show that we lose approximately $4 for every $1 in States where we cannot polygraph. So there is about a 4-to-1 ratio.

Senator **Pell**. Would you be kind enough to submit that for the record, those statistics?

Mr. **Zale**. Yes, sir, we shall.

Senator **Pell**. Thank you.

And are there insurance claims reports or other hard evidence to support the efficacy of the polygraph?

Mr. **Zale**. I do not believe I understand you, exactly.

Senator **Pell**. Do you have any insurance company reports—do you get less insurance, at a lower rate, for example——

Mr. **Zale**. Yes, sir, we do.

Senator **Pell** [continuing]. In areas where you use the polygraph as opposed to not?

Mr. ZALE. I believe we do. I would have to doublecheck that.

Senator PELL. Could you, and let us know for the record?

Mr. ZALE. Yes, sir.

The CHAIRMAN. I might add there is no question in the public carrier industry, one of your big worries is that you are having difficulty getting liability insurance now, and it is escalating in cost, and I think most industries feel the same way, and one of the concerns you have is being able to screen unsafe drivers from driving, like you say, these 80,000-pound vehicles. So it is a major, major concern.

Mr. MATTHEWS. Senator, I shudder to think what our insurance premium would be if we were not allowed to give preemployment polygraph tests. I honestly think that half the trucking industry would not be able to obtain insurance at any price.

Senator PELL. Thank you very much.

The CHAIRMAN. Thank you, Senator Pell.

Senator Dodd?

Senator DODD. Thank you, Mr. Chairman. I will try and be brief, if I can, here. I know you want to get going.

Mr. Scheve, I was intrigued with your testimony because you pointed out some areas where, in the House bill, anyway, there was a decision to allow for an exemption in some areas, and then you accurately point out there seems to be a modest difference between the person driving the armored car and the bank teller. I almost got the impression—and I do not believe you mean this—but that it would be at least more honest to have no exemptions whatsoever than to have some exemptions. Is that the implication of your testimony?

Mr. SCHEVE. I think the main thrust of the bill, Senator, is as Congressman Williams said, if the polygraph is not reliable, is not valid—which I know to be untrue—but if he really believes that, and if this Congress really believes that, then how can we make exemptions for anybody? Throw it all out, or utilize it to the best of its advantage.

I think what needs to be remembered about the polygraph technique is that it is an investigative tool. No decision should be based solely on the polygraph itself or the polygraph results, unless they are backed up by statements or admissions or other data that support the polygraph examiner's opinion.

Senator DODD. Can you think of any criteria—and I will ask all of this—but having stated sort of your pure position on this, are there criteria that would help in determining which businesses ought to be allowed to conduct the polygraph and which others ought not? Can you imagine any such criteria existing?

Mr. SCHEVE. No, sir, I cannot. It is either a useful tool for everybody, or it is a useful tool for nobody.

Senator DODD. Do you all agree with that?

Mr. MATTHEWS. I do.

Mr. ZALE. We were prepared to work with the committee to come up with appropriate legislation, and we did not come here looking for any specific exemptions. We wanted to make a bill that would work, Senator, which would accomplish the concerns that you people have, as well as accommodate the problems that we have, as well.

Senator **Dodd**. Yes.

Mr. **Scheve**. Senator, I believe the abuses can be controlled by Federal guidelines overseeing the State laws and requiring the States to have certain minimum standards and to have enforcing authority, which they all have. Some States do this very, very effectively; some States are weak. Under Federal guidelines, this would become something that would eliminate 99 percent of the abuses. None of us examiners who regard ourselves as professionals appreciate some of the things that were brought up today, but we do know they exist. But they do not exist in the truly competent professional examination that adheres to the principles and practices that are established by organizations like the American polygraph Association.

Senator **Dodd**. Mr. Ostrovsky, can you provide similar data that was provided by Mr. Zale with regard to the difference in theft rates between New Jersey and Nevada?

Mr. **Zale**. I can seek that information out, Senator. I do not know what is available, but I can certainly do that and pass it along to the committee in the next week or so.

Senator **Dodd**. Just in the ballpark, do you have any idea at all whether or not there is a difference?

Mr. **Zale**. No, I do not know.

Senator **Dodd**. I wonder if you could just comment again for me—and again, the data could be helpful, and the chairman has already asked for it—but I would be curious, with those employees that you have tested and tested positively—or negatively, I guess—and then determined later were actually involved in thievery, or drug abuse, or whatever, do you keep data like that?

Mr. **Zale**. Yes, sir. We keep data on the number of polygraphs that we give and how many admissions come out of that as to violations of company policy, theft, and so forth.

Senator **Dodd**. What happens to that information if an employee terminates his service?

Mr. **Zale**. Well, that information remains in our confidential files, and it is not disclosed to anyone.

Senator **Dodd**. As an employer, if another business were to call you and ask you whether or not you have any information on employee X and whether or not they took a polygraph test?

Mr. **Zale**. We have a written policy that states we do not give that information. It says: "It is Zale Corp.'s policy when giving references on former employees to release information only on the employment dates and job title. No other information is to be released under, any circumstances, whether requested in writing, by telephone * * * " and so on.

Senator **Dodd**. What about an employee who you rejected for employment because they had failed a polygraph test, and then went out and sought employment someplace else, and an employer asked you for that information?

Mr. **Zale**. We would not divulge it at all.

Senator **Dodd**. How about you, Mr. Matthews—you do not hire the trucker you think is a bad risk; Trucking Company Y then calls you and asks: "Did you ever check this guy out? Do you have any information on it?" Do you provide that information?

Mr. **Matthews**. We do not pass that along, no, sir.

Senator DODD. You do not provide it?

Mr. MATTHEWS. No.

Mr. ZALE. Senator, if I might add a comment to that, that is a big problem as well, and that is one reason why the use of polygraph is important. Today it is almost impossible to get information on prior employment activity. And with the mobile society that we have in America, where people move, I think, every 4 years-plus, we have a very active population, and we do not have the stability that we used to have in America, and there is a breakdown in our moral fabric by virtue of the number of people we employ who are either on drugs or were on drugs.

It is a significant problem. We cannot put our heads in the sand.

Senator DODD. No; I do not think anyone is saying that. You are not hearing that from, I do not think, anyone on this committee. We all appreciate the problem, but we just do not want to create more of a problem. We also have some strong constitutional prohibitions against people being discriminated against, and I think all of us are very conscious of that.

Mr. ZALE. Right.

Senator DODD. How about you, Mr. Ostrovsky, with regard to prior employment?

Mr. OSTROVSKY. The policy of the MGM Grand Hotel and the gaming industry in general is not to release any information about an employee other than the dates of their employment, the salary rate, and their job classification; this is on a background check.

It is very difficult to get information from any employers in or outside the gaming industry about a person's past work history. Most employers today fear that an employee will come back at them if a bad reference is given. So it is a policy of the hotel not to give any.

Now, I will tell you that the Nevada Gaming Control Board has access to files, and polygraph results are not kept in employee personnel files; they are kept in a confidential file. The gaming control board has the right to withdraw an employee's workcard which, that employee, if that card were removed, would be unable to work within the gaming industry at least in the direct gaming classifications. And the control board may withdraw an individual's card based on their own investigation which includes the investigation of our files and whatever investigation, and they can at that point turn it over to a criminal case if they so seek to choose criminal prosecution at the county level. But between employers, that information is not shared.

Senator DODD. And I presume all of this data is on computer—your businesses are all large enough that it would all be kept in that kind of a repository; is that true?

Mr. MATTHEWS. No, sir; ours is not kept on computer. It is in an individual, personnel file.

Mr. ZALE. Ours is in individual files; it is not computerized.

Mr. OSTROVSKY. We are on a computer system for personnel records, but polygraph information, and whether a test was taken or not, is not kept in the computer.

Senator DODD. It might be helpful if all three of you could provide the committee with the written policies you have with regard to polygraph tests.

**Mr. Ostrovsky.** Mine is attached to my written statement, which has already been submitted to the committee.

**Senator Dodd.** It is, all right. If the rest of you could as well, it would be helpful, I think, to the committee.

[Information subsequently supplied follows:].

H.R. MATTHEWS
PRESIDENT
P.O. BOX 16709
ATLANTA, GA 30321
PHONE (404) 627-7747

CALVIN C. SILCOX
EXEC. VICE PRESIDENT
2061 SCL DRIVE
JACKSONVILLE, FL 32209
PHONE (904) 354-6794

BENTON BROS.
FILM EXPRESS
INC.

M.B. CORDERO
VICE PRES. OPERATIONS/SALES
P.O. BOX 16709
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PHONE (404) 627-7747

A.C. SAFFOLD
VICE PRES. MAINTENANCE
2061 SCL DRIVE
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PHONE (904) 354-6794

May 12, 1986

The Honorable Orrin G. Hatch
United States Senate
Chairman
Senate Labor & Human
 Resources Committee
Washington, D.C. 20510

Dear Senator Hatch:

During the course of my testimony before your Committee, Senator Dodd asked me for a copy of our written policy on polygraphs. Our Company does not have a written policy, but it is the policy of our Company to maintain this information in a very confidential manner, releasing it to no one.

I hope this is sufficient information for Senator Dodd, but if I can be of any further assistance please contact me immediately.

I again thank you and your Committee for the opportunity to appear before you to give you the thoughts and position of not only my Company, but all of the American Trucking Association. We ask for your favorable consideration and your deliberations.

Very truly yours,

BENTON BROS. FILM EXPRESS, INC.

Herbert R. Matthews
President

HRM/cp

SPECIALIZING IN
Printed Matter – Magazines – Film – Air Freight – General Commodities

ZALE CORPORATION

Donald Zale
Chairman of the Board
Chief Executive Officer

May 13, 1986

MAY 2[illegible] 1986

Senator Orrin Hatch
Senate Russell Building
Room 135
Washington, D.C. 20510

Dear Senator Hatch:

Attached you will find a copy of our policy on the disclosure of information for terminations and the inventory shrinkage figures as was discussed in my oral testimony before the Committee of Labor and Human Resources on the Polygraph Bill.

I would like to reiterate our input to you at those hearings that it is our desire to work with your committee in a development of a bill that would meet the needs of the business community and our employees.

Sincerely,

Donald Zale

Donald Zale
Chairman of the Board
Chief Executive Officer
Zale Corporation

DZ/deh

Attachments

Executive Offices 901 W. Walnut Hill Lane Irving, Texas 75038-1003 Telephone 214 257 [illegible]
Mail Address P.O. Box 152777 Irving, Texas 75015-2777

## E. SEVERANCE PAY

1. Severance pay and other benefits shall be administered in accordance with the chart on the following page. Eligible employees are those separated due to a reduction in force or, in the case of employees with ten or more years of service who are discharged for poor performance, if the Divisional/Corporate Vice President of Human Resources approves, and only upon receipt of a signed release. Employees discharged for cause or who voluntarily resign are not eligible. See other sections of this Personnel Manual for definitions, other restrictions, and the release form. One year service is required to receive severance pay with two exceptions provided for in the MCP.

2. Severance pay is based on an employee's anniversary date. Appropriate severance pay is one week's pay for every full year employed up to the maximum. Severance pay will not be prorated for portions of a year and will be paid in lump sum.

3. Employees who qualify for severance pay will also be paid the prorated portion of the vacation they would have earned the following April 1. Personal holidays are not accrued.

4. When operating units of Zale Corporation are purchased by another company, employees who keep comparable positions with the purchasing company will not be paid severance pay or accrued vacation, nor will any benefits be available if any offer of employment is refused.

5. CHART - See following page.

## F. NOTICE PAY:

All employees, irrespective of service, who are not discharged for cause or voluntarily resign, will be given two weeks notice of a company initiated separation. If the company fails to give the notice or does not allow an employee to work during this time the employee's pay will be continued during the two week period.

## G. REFERENCES & LETTERS REGARDING TERMINATION:

It is Zale Corporation's policy, when giving references on former employees, to release information **only** on the employment dates and the job title. No other information is to be released under **any** circumstances whether requested in writing, by telephone or personal contact. All requests for references must be referred to Personnel Services, 257-4166.

If an employee demands a letter stating the reason for termination, it will not be given unless required by law. Call Corporate EEO/Labor Relations if there is a question with regard to state law.

## EXECUTIVE SUMMARY

## ANTI POLYGRAPH BILL

Shrink

1. States (13) in which we cannot polygraph in, we have a shrink of 2.17% to sales.
2. States (18) in which we do no preemployment, but do other types of polygraphs, we have a shrink of .98% to sales.
3. States (19) in which we do all types of polygraph, we have a shrink of .74% to sales.
4. States where there is no polygraph allowed, shrink is 2.17% of sales, whereas states with some form of polygraph is .86% of sales.

Senator DODD. Mr. Chairman, that is all I have.

The CHAIRMAN. Thank you, Senator Dodd.

We appreciate the testimony you have brought today. It has been an extremely informative and interesting hearing to me, and I think to others as well.

So with that, we want to thank you for the efforts you have put forth—and for the risk that you have taken, Mr. Zale, we appreciate that, too.

Thanks so much, and with that we will recess until further notice.

[Whereupon, at 12:50 p.m., the committee was adjourned.].

[Additional material supplied for the record follow:]

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**Senator Dan Quayle**

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STATEMENT SUBMITTED BY U.S. SENATOR DAN QUAYLE (R-IN)
AT THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE HEARING
ON S. 1815, THE POLYGRAPH PROTECTION ACT
April 23, 1986

Mr. Chairman, I commend you for holding this hearing. I believe it is important for this Committee to examine questions raised by the use of polygraphs. It is equally important that we examine the issue of extending federal regulatory authority as proposed by S. 1815, the Polygraph Protection Act.

If this Committee considered legislation every time there were abuses in hiring and firing practices, we would find ourselves holding hearings not only on a polygraph bill but also on proposals to legislate on countless questions that have been subject to state regulation but -- so far -- not federal law. These issues, to name but a few, include: just cause for discharge, discharge for summons to do jury duty, for being a whistleblower, for refusing to be sterilized, for wage garnishment, for being a volunteer fireman, for exercise of First Amendment rights, for filing a workmen's compensation claim, for refusal to contribute to group health insurance and for refusing to work with hazardous substances.

There is no compelling reason why the federal government should preclude private employers from using polygraphs. The principles of federalism mandate that we should not intervene in matters that have traditionally been the responsibility of the States, and in which there is no overriding need for national policy uniformity.

The States are free to regulate the use of polygraphs, and nearly half of them now do so. In fact, the State of Utah currently makes it unlawful for an employee's refusal to submit to a "surreptitious exam" to be the basis for denying or terminating his or her employment (Utah Code Ann. 34-37-16). If the State of Utah can regulate the use of polygraphs, certainly the other States should be permitted to deal with the issue as they deem appropriate.

There is another reason I feel this legislation is unwarranted. It professes to protect employees from the use of polygraphs -- but it actually permits their use under several circumstances. Under the House-passed polygraph bill, H. R. 1524, which will likely set a pattern for what happens in the Senate, you may use polygraphs on employees if you run a day care center, nursing home or utility, if you manufacture or distribute drugs, if you provide security services, if you are in the federal, state or local government and if you are among a certain category of defense contractors. Polygraphs are all right for these employers, but they're not all right for all others.

That makes no sense. Jewelry manufacturers and dealers, securities and banking services and trucking companies and movers may all require the use of polygraphs at some time. Given the current concern over terrorism, the airlines may also soon need to use polygraphs, but that recourse would be closed to them under both H. R. 1524 and S. 1815.

[MORE]

A series of industries and individual companies contacted most of us on the Committee asking to be exempted from this proposed legislation. Why don't they question whether there should be a bill at all? If this proposal becomes law, we will surely find ourselves revisiting it at a later time. But as with the Fair Labor Standards Act, when we do so, we will not be including new exemptions but rather knocking old ones out.

There is yet another reason why this legislation should be rejected: it would establish a double standard -- one for the public sector and one much more restrictive for the private sector.

Unions can bargain collectively on the use of polygraphs, and many have. Why should the federal government thrust its intrusive hand into the internal workings of labor and management? If unions oppose the use of polygraphs, they should bargain accordingly. The Master Freight Agreement which the Teamsters have negotiated with trucking employers already permits the use of polygraphs in pre-employment, but not after the trucker is hired.

I am simply not convinced this bill is needed. I do not believe the federal government should be involved in setting standards on the use of polygraphs for the States when many States already prohibit or restrict their use. It took years to perfect the x-ray, and many more years passed before individual physicians specialized in radiology. It took many years for the fingerprint to become accepted as useful, and only recently have computer programs been developed to positively match an individual's fingerprints with his or her criminal record.

I remind my colleagues of the words of Sophocles: "Nobody likes the man that brings bad news." This is a bill to kill the messenger of potentially bad news, to bar private employers from using polygraphs. Is it really our prerogative to bar employers from using polygraphs because the tool is not yet perfected? I am not convinced that this is the duty of the federal government.

Further, I do not think that a single morning hearing is sufficient to educate this Committee on the serious questions raised by S. 1815. I regret that I am unable to attend today's hearing due to an unavoidable schedule conflict, and I ask that the Chairman schedule an additional hearing so that other individuals who wish to testify on S. 1815 may come forward and offer us their views.

# # #

United States Senate

COMMITTEE ON LABOR AND
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WASHINGTON, DC 20510

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April 23, 1986

STATEMENT BY SENATOR CHARLES E. GRASSLEY BEFORE THE COMMITTEE ON LABOR AND HUMAN RESOURCES ON POLYGRAPH TESTING LEGISLATION.

Mr. Chairman, Do lie detectors lie? The use of polygraphs by Employers in the private sectors is controversial, and rightly so. The use of polygraph tests by employers has increased three fold in the last ten years, and three out of every four tests administered are in connection with pre-employment screening.

Critics of these tests point out that there is little, if any, scientific evidence to indicate that polygraphs can do what they are advertised as being able to do -- detect lies. Polygraphs simply measure physiological responses that may or may not indicate a subject is telling a lie. It is also my understanding that with very little training, persons can be taught to alter their physiological responses in such a way as to "fool" the machine. Both the Office of Technology Assessment and the American Psychological Association have concluded that there is no satisfactory scientific evidence to establish the validity of the polygraph as a lie detecting device. The stories we have all heard of abusive or incorrect uses of polygraphs by employers is additional cause of concern.

Concerns about polygraph testing in the workplace have already led a number of states to regulate the field in some form or another. A recent article in the New York Times pointed out that seven states ban private employers from using polygraphs in connection with screening prospective employees or tracking down suspected wrongdoers. Nineteen other states and the District of Columbia regulate their use. According to the American Polygraph Association, 30 states have had laws requiring licensure or certification or polygraph examiners. Iowa has had a law prohibiting employers from forcing employees to take a polygraph test since 1983.

But there is another side to the story. Theft is a serious problem in American business today. Estimates of the cost of economic crime including employee theft, against business, range from $67 billion to $200 billion annually, and it has been estimated that up to one-third of all business failures are caused by employee theft. Employers clearly feel that polygraph tests, properly used, are an important means to deter and detect employee theft. Defenders of the use of polygraphs by private employers argue that the tests, when properly administered by experts, are accurate 85-90 percent of the time. They also contend that, not withstanding individual horror stories, most employers will not make a decision with regard to an employee's future based solely on the results of a polygraph test.

Perhaps employers have a point when they say that a properly administered test in the hands of a responsible employer is a valuable and necessary tool. I note that the bill introduced by the Chairman and ranking member of this Committee would exempt the federal government and state and local governments. It would also allow polygraphs to be administered to persons employed by defense contractors who have access to classified material. In addition to these exemptions, the measure passed by the House of Representatives in March exempts private security agencies, day care centers, nursing homes, electric power generating companies, and permits polygraph tests of employees or prospective employees with direct access to government-controlled drugs.

Mr. Chairman, I am glad you are holding this hearing, because it is not clear to me yet how, or even whether, the federal government should regulate polygraph tests. I am looking forward to reviewing the record of this hearing as I try to reach a decision.

American
Psychological
Association

TESTIMONY OF

Leonard D. Goodstein, Ph.D.

Executive Director

AMERICAN PSYCHOLOGICAL ASSOCITION

before the

COMMITTEE ON LABOR AND HUMAN RESOURCES

UNITED STATES SENATE

on the subject of

S.1815

THE POLYGRAPH PROTECTION ACT

April 23, 1986

Honorable Orrin G. Hatch, Chair
430 Dirksen Senate Office Building

1200 Seventeenth St. N.W.
Washington, D.C. 20036
(202) 955-7600

I am Leonard D. Goodstein, Ph.D., Executive Director of the American Psychological Association (APA), and I am pleased to submit this statement to the Senate Labor and Human Resources Committee in support of S. 1815, the Polygraph Protection Act. This bill would prevent the use of lie detectors by employers, and APA strongly favors its passage.

APA is a professional organization representing 87,000 psychologists who work as researchers, clinicians, educators and consultants in many subfields of psychology, including those areas involving the development and use of scientifically valid personnel selection methods. It is the opinion of APA that scientific evidence for the validity of polygraph tests to detect deceptive behavior, particularly in the area of employment screening, is unsatisfactory.

The APA Council of Representatives, our chief policy-making body, passed a resolution on February 1, 1986 which states that the reliability of polygraph tests is unsatisfactory. The text of the resolution follows:

> "The conduct of polygraph tests to select employees, to ascertain the honesty of employees, and to determine the truthfulness of aspects in criminal investigations has increased significantly in recent years. APA has great reservations about the use of polygraph tests to detect

deception.

- Despite many years of development of the polygraph, the scientific evidence is still unsatisfactory for the validity of psychophysiological indicators to infer deceptive behavior. Such evidence is particularly poor concerning polygraph use in employment screening and in dealing with victims of crime.

- Those giving polygraph tests often have limited training and expertise in psychology and in the interpretation of psychophysiological measures.

- There is the possibility of great damage to the innocent persons who must inevitably be labeled as deceptors in situations where the base rate of deception is low; an unacceptable number of false positives would occur even should the validity of the testing procedures be quite high.

In consideration of the above, it shall be APA policy that:

- Polygraph tests used in all applied settings should be based on adequate psychological and psychophysiological training and sophistication. Their use by psychologists must be consistent with the [APA] Standards for Educational and Psychological Testing and the [APA] Ethical Principles of Psychologists. They should be used only when such use is justified by the existence of sufficient data on their reliability and validity for the particular population, context and specific purpose."

Polygraph tests have been used for years in attempting to detect deceptiveness, most visibly in the area of trying to discover the guilt or innocence of criminal suspects. More recently, many private employers have been using polygraph tests as a screening device for prospective or present employees to test for a range of dishonest behavior. However, from a scientific point of view, there is not sufficient evidence to demonstrate that a polygraph test can accurately determine if a person is telling the truth or is lying, particularly when it is used in employment screening.

The polygraph instrument itself simply records physiological reactions, including respiration rate, heart rate and perspiration. There is no conclusive scientific evidence that the physiological reactions measured in a polygraph test directly indicate that a subject is lying; the polygraph test is not in itself a "lie detector". It is the interpretation of the physiological responses recorded by the polygraph instrument that have been used to determine deceptive behavior. This interpretation relies on the examiner's behavior and judgement, and many people who give polygraph tests in employment settings have limited training and expertise in psychology and in the interpretation of psychophysiologcal measures.

The method used most often in employment screening situations is known as the Relevant/Irrelevant (R/I) method. In R/I tests, an individual is asked a series of questions relevant to his or her background. Physiological recordings are made of responses to questions about relevant issues, such as previous employment, and are compared to responses made to the irrelevant issues. This test assumes that if individuals are lying, they will have a greater physiological reaction to questions about an undesirable character trait or a crime committed than to irrelevant questions about background. This type of test also assumes that an individual who is telling the truth will respond equally as calmly to all questions. There is insufficient scientific evidence to support the validity of these frequently used R/I tests.

A second polygraph test, the Control Question test, is frequently used when investigating a specific incident, such as a crime. In a Control Question test the relevant and irrelevant questions are also asked of the individual, but also included are some questions designed to bring about a strong response even with innocent subjects. For example, questions about whether the individual had stolen something in his or her life would be asked if the incident being investigated involved stealing. The examiner would assume that the subject has stolen something at some point, and if he or she denies this, the subject must be lying. This technique is intended to control for the anxiety a subject may have about the test. Control Question tests would probably not be used in employment situations, except in instances where a crime has been committed in the workplace. In these situations when a Control Question test is used in employment settings, the important issue of the privacy of the employee must be considered, as establishing control questions involves asking about areas of an employees personal life not necessarily relevant to work.

The polygraph test has been called a method of interrogation. The use of the polygraph depends on instilling fear in subjects. As long as individuals believe that the test can detect guilt and truthfullness, they may demonstrate a greater physiological reaction to questions about which they are lying than the questions about which they are telling the truth. There are many factors which can affect the validity of polygraphs. For example, those individuals who are indeed guilty or dishonest would probably be those most likely be skillful in using countermeasures during the testing itself. Countermeasures are difficult to detect and make interpretation difficult. A report published by the Office of Technology Assessment (OTA) in 1983 on the validity of polygraph testing discussed this problem: "Any physical activity which could affect physiological response is a potential problem for interpretation of a polygraph test record." One former polygraph examiner claims to have taught thousands of people how to fool the polygraph by learning to recognize various types of test questions as being relevant, irrelevant or control questions, and then altering their physiological signs to confound an examiner's expectations.

Another issue of very serious concern to APA is the possibility of great damage to innocent persons who are falsely labeled as lying by the polygraph test. The OTA study discussed the many instances of inaccurate findings of guilt or innocence in studies of polygraph use. When an individual is falsely accused of lying, it could have a negative impact his or her present job, as well as chances for jobs in the future.

The use of polygraphs in any setting must be based on adequate psychological and psychophysiological training. Most of the examiners using polygraphs for employment screening are not psychologists, and most do not have adequate training. When polygraphs are used by psychologists, their use must be consistent with the rigorous standards of APA's Standards for Educational and Psychological Testing and the APA Ethical Principles of Psychologists. The use of polygraphs for employment screening in most cases would not meet these strict standards.

Consistent with the resolution passed by APA's Council of Representatives, APA strongly supports the passage of S. 1815. We encourage the Committee to approve the bill in its present form, without any exemptions for special situations. Polygraphs should not be used in the workplace because the scientific evidence of validity for polygraphs is unsatisfactory, particularly in employment screening situations. Its use in these circumstances has the potential to cause damage to many innocent individuals and to society as a whole.

**AMERICAN**
**BANKERS**
**ASSOCIATION**

1120 Connecticut Avenue, N.W.
Washington, D.C.
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EXECUTIVE DIRECTOR
GOVERNMENT RELATIONS

Edward L. Yingling
202/467-4097

April 30, 1986

Honorable Orrin Hatch
Chairman
Senate Committee on Labor and Human Resources
428 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

The American Bankers Association shares the concern of Congress over the widespread use of polygraphs in the private sector, without proper controls. However, the American Bankers Association believes a complete ban on the use of polygraphs is not in the best interest of the private sector. We urge the Committee to exempt federally regulated financial institutions.

The House of Representatives quite correctly believes that the polygraph is a useful tool when properly administered. In both S. 1815 and H.R. 1524 Congress has proposed to exempt the U.S. Government, state or local governments and National Defense and Securities Agencies. In addition, H.R. 1524 as passed by the House of Representatives, exempts nursing homes, public utilities, security services, day care centers and certain drug companies.

It is equally important that financial institutions remain able to use the polygraph to deter criminal activity and to identify dishonest employees. The general reasoning behind the above cited exemptions would certainly apply to financial institutions, where large dollar amounts are processed on a daily basis. For example, it appears to be most inconsistent that companies providing security services that transport "currency, negotiable securities..." are exempt from the ban, but banks and securities firms are not accorded the same treatment.

Financial institutions suffer significant losses as a result of internal theft. According to F.B.I. statistics losses to financial institutions from fraud and embezzlement totaled $382 million in 1984. More than 80% of these losses were attributed to internal sources. Contrast this with losses attributable to bank robberies, burglaries and external larcenies which amounted to $42 million in 1984.

The wide spread use of automated teller machines and point of sale terminals is becoming a source of increased loss. Millions of dollars can be diverted in an instant to another account if a computer code is compromised. Coupled with other acts of dishonesty such as credit card fraud, forgery and the alteration of checks and securities, the potential for internal fraud is potentially staggering.

Banning the use of the polygraph by financial institutions at a time when there is increased loss from internal theft would eliminate a powerful deterrent in the fight against crime.

Financial institutions have numerous statutory duties to guard against criminal activity. The Federal Deposit Insurance Act requires that institutions that hold federally insured deposits may not employ "...persons convicted of any criminal offense involving dishonesty or a breach of trust without first obtaining the written approval of the F.D.I.C."

In addition, the Bank Protection Act of 1968 requires federal bank supervisory agencies to develop standards for bank security systems. Commercial banks are required to investigate suspected thefts, embezzlements, defalcations involving bank funds, mysterious disappearances of bank funds or assets, and any suspected violation of state or federal law involving bank affairs and to report the details to the federal regulatory agencies and federal law enforcement agencies. Because of the dramatic effects a total ban would have on the security of the financial institution, we respectfully suggest that the Committee consult with the Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, Federal Reserve Board, Federal Home Loan Bank Board, National Credit Union Administration and Securities Exchange Commission on this matter.

The responsible use of the polygraph is an effective investigative tool which can protect the innocent as well as identify dishonest employees.

We hope the Committee will amend S. 1815 to exempt federally regulated financial institutions.

The American Bankers Association would like this letter to be made part of the official hearing record.

Sincerely,

Edward L. Yingling
Executive Director
Government Relations

# STATEMENT OF THE AMERICAN PHARMACEUTICAL ASSOCIATION

The American Pharmaceutical Association (APhA) is the national professional society of pharmacists, representing the third largest health profession comprised of more than 150,000 pharmacy practitioners, pharmaceutical scientists and pharmacy students. Since its inception in 1852, APhA has been a leader in the professional and scientific advancement of pharmacy and in safeguarding the well-being of the individual patient and the American public.

We welcome this opportunity to submit written testimony addressing the issue of use of polygraph testing in the workplace.

The American Pharmaceutical Association wishes to express strong support for S.1815 which would prohibit the use of polygraph testing in the workplace. Our position is that polygraph tests should not be used as a means of pre-employment screening in pharmacies; should not be used in pharmacies for routine "security" checking of employees; and should not be used in pharmacies in the course of investigations for cause.

We recognize the problem of internal theft and are aware of the efforts of those who believe use of polygraph testing will curb this problem. However, we hold that the use of polygraph tests is inappropriate for two major reasons: (1) questions of testing accuracy; as well as (2) constitutional and invasion of privacy issues.

In examining questions of the accuracy of polygraph testing one must look first at how the test operates. The polygraph does not sound an alarm whenever an answer is untruthful. Rather, limited physiological responses of the subject are interpreted by the examiner. It is, therefore, the interpretation of the examiner which determines whether the subject passes or fails the polygraph test.

A brochure published by the American Polygraph Association states, "In laboratory role-playing experiments, with reasonable attention to motivation, research psychologists have achieved accuracy of over 80 per cent" in the use of polygraph tests. Some polygraph examiners claim an accuracy of 90-95 percent. However, what do these claims really mean? Researcher Peter Holden of Wichita State University clarifies the matter when he points out, "if 95% accurate, a machine testing 1,000 people--25 of whom are lying--will detect 24 of the 25 liars; but among the remaining subjects it will erroneously identify 49 honest people as liars. If only 90% accurate, the polygraph would misidentify 98 of those guiltless subjects as liars."

While these figures may please corporate employers, to those 98 innocent people turned down for employment and branded as liars the result is an inexcusable injustice. If the research results of 80% accuracy reported by the American Polygraph Association are accurate, the injustice is substantially greater. These figures are from research conducted with qualified examiners. How low would those accuracy figures go with the use of poor quality examiners?

If questions of the accuracy of polygraph testing aren't enough to ban their use in the workplace, use of polygraph tests also raise profound constitutional and invasion of privacy issues. Even if the polygraph test were 100% reliable there are still serious questions about invasion of privacy, violation of the Fourth Amendment protection against unreasonable searches, of the Fifth Amendment protection against self-incrimination, of the constitutional presumption of innocence until proven guilty, and of the Sixth Amendment right to confront and cross-examine one's accusers.

Although use of polygraph tests may appear to reduce an immediate problem it creates other and far more significant problems than property loss. In our view, this threat to human values outweighs any arguable benefits to the use of polygraph testing.

The American Pharmaceutical Association urges the Committee to report favorably S.1815 and to prohibit the use of polygraph testing in the workplace. We suggest that polygraph proponents use other more reliable loss prevention techniques. Many are available and they should not be put aside for mere reasons of expediency.

Thank you for the opportunity of providing this testimony.

AMERICAN RETAIL FEDERATION
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JOSEPH P. O'NEILL
PRESIDENT

April 30, 1986

The Honorable Orrin G. Hatch
Chairman
Committee on Labor and Human Resources
428 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

The American Retail Federation is an umbrella organization representing the 50 state retail associations, some 30 national associations and corporate retailers, large and small. In all, we represent over one million retail establishments which employ nearly fourteen million workers.

The American Retail Federation wishes to state once again our unequivocal opposition to S. 1815 as presently drafted, while we recognize the need for balanced and effective legislation in this area. The bill as currently drafted would preclude our retailing members from utilizing the polygraph examination as one in a series of tools for determining a worker's eligibility for employment. Moreover, retailers would be unable to polygraph current employees as a part of investigative techniques upon an incidence of theft or fraud. The retailing community sustains through employee theft a loss of merchandise estimated to be more than forty percent of inventory loss. Nationwide employee pilfering is costing American retailing billions of dollars each year. These losses inevitably raise the cost of goods and services to the consumer. In an effort to minimize these significant losses retailers utilize polygraph tests along with other security procedures to ascertain an applicant's honesty or to investigate major internal shortages. It is the experience of our members that the prudent use of polygraph examinations has proven to be very useful in curbing this critical problem. We believe that retailers have a right to implement reasonable procedures, including carefully selected and administered polygraph examinations to help protect against theft.

We, therefore, respectfully urge that you and the members of your Committee examine the issue of polygraph application carefully and reconsider the effect of S. 1815 upon retailing, a major sector of the business community.

Mr. Chairman, we thank you for your consideration of our point of view.

Sincerely,

Joseph P. O'Neill
President

JPO:asl

American Society
for Industrial Security

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April 23, 1986

The Honorable Orrin G. Hatch
Chairman, Labor and Human
  Resources Committee
428 Dirksen
U.S. Senate
Washington, DC 20510

Dear Mr. Hatch:

Thank you very much for your kind letter of April 11, 1986 indicating that due to the large number of requests to testify on polygraph testing in the workplace, it would not be possible to honor our request. Please find enclosed a copy of our statement outlining this society's position with respect to Senate Bill 1815. Your assistance in having this statement considered as part of the official hearing record and having it reviewed by the committee prior to markup of the legislation will be greatly appreciated.

Thanking you again for providing us with the opportunity to address an important matter of concern to our membership, I remain,

Sincerely,

E.J. Criscuoli, Jr.
Executive Vice President

Enclosure

# STATEMENT OF
# THE AMERICAN SOCIETY FOR INDUSTRIAL SECURITY
# CONCERNING THE
# POLYGRAPH PROTECTION ACT OF 1985
# (SENATE BILL S.1815)

PRESENTED TO

COMMITTEE ON LABOR AND HUMAN RESOURCES

OF THE

UNITED STATES SENATE

Mister Chairman and Members of the Committee:

I am E.J. Criscuoli, Jr., executive vice president of the American Society for Industrial Security. My written statement at this time is on behalf of the officers, directors, and members of the American Society for Industrial Security (ASIS). Prior to becoming the Society's executive vice president, I was employed for more than twenty-five years at various management levels in the field of security in both the private and public sectors. Eighteen of those years were with one of the nation's largest corporations with plants located throughout the world. I was also the Society's 20th President in 1974.

The Society would like, at this time, to thank the chairman of this committee for the opportunity to present our written concern in an area that affects not only the private security sector--dedicated to protecting the personnel, property, and information of business and industry--but also the interests of the public at large.

## Putting S.1815 In Its Proper Perspective

Crime against business is an insidious and growing problem in the United States--one with which we at ASIS are very familiar. We have witnessed firsthand the problems and losses it inflicts on both business and the public at large. Crimes against business are said to cost the American economy more than $40 billion in annual losses; some experts estimate as high as $200 billion.[1] This number does not include the cost of investigating and prosecuting the offenses.

Let me assure you these losses are ultimately passed on to the consumer in the form of higher prices. An interesting point to consider is that many of these offenses are committed by insiders--men and women in positions of trust who abuse their positions largely for personal gain. Business has an obligation to both its stockholders and the public to insure its assets and institutions will not be used to the detriment of our society.

To prevent members of this Committee from downplaying the scope and seriousness of this problem, I would like to cite the following illustrations:

* According to the American Bar Association (ABA), business computers are now being used to embezzle money, alter data, and defraud corporate stockholders for up to $730 million annually. These losses reflect only the tip of the iceberg, since many business crimes often go unreported. Seventy-eight percent of those who responded to an ABA survey noted "the perpetrators were individuals within their organization.[2]

* A survey of 5,127 banks and 854 insurance companies by the EDP Fraud Review Task Force of the American Institute of Certified Public Accountants (AICPA) found many of the thefts and other losses the private sector suffers can be attributed to dishonest employees. Insiders were found to steal assets, data, and other valuables; losses per incident ranged up to several million dollars.[3]

* A national survey by the accounting firm of Arthur Young found employees--not shoppers--are the leading cause for mounting losses in the retail industry: the numbers were placed at more than $2 billion a year. To carry their losses, retailers simply raise their prices. As a result, each consumer in the United States pays an extra $300 annually in higher retail prices.[4]

* A Babaco Alarm Systems, Inc. survey of sixty randomly chosen cargo thefts discovered losses averaged $50,000 per incident during the first four months of 1985. Textiles, clothing, food, business equipment, and jewelry were the leading targets.[5] The survey also stated cargo theft from motor vehicles costs American businesses more than $500 million annually in losses.[6]

- A survey by Opinion Research Corporation found one in four employees in leading United States companies was hired on the basis of a doctored resume.[7]
- The diversion of drugs to black market sources is said to cost the pharmaceutical industry $1 billion annually in losses. One such scam bilked a large New Jersey-based pharmaceutical firm out of more than $1 million.[8]
- According to the US Chamber of Commerce, the annual losses from embezzlement and pilferage are said to exceed those sustained throughout the nation from burglary and robbery by several million dollars.[9] Embezzlement and pilferage are insider crimes.
- A survey of 172 known cases of fraud and abuse involving insiders by the Office of Inspector General for the US Department of Health and Human Services found losses per incident ran as high as $177,383.[10]

Crimes against business translate into higher prices and taxes, bankruptcies, and loss of confidence in our free enterprise system. The polygraph and other investigative screening instruments must be viewed in the above contexts. Unfortunately, the private sector has no other recourse but to turn to existing technologies to safeguard the public and the nation. To remain competitive, America's businesses must by necessity provide reasonably priced goods and services. Dishonest insiders make this difficult.

In 1985, more than 2,000 men, women, and children lost their lives to aviation accidents, but no reasonable person would call for an end to air travel. Except for scant reference to several abuses, no one has yet demonstrated any lie detectors cause irreparable harm. Yet we are now confronted with legislation that would curtail the private sector's option to use existing technologies to safeguard the public's interest. We oppose such efforts.

## Arguments in Support of S.1815 are Flawed

On March 7, 1985, Representative Pat Williams (D-MT) introduced the Polygraph Protection Act (H.R.1524) on the House side. He was joined by 165 cosponsors, including twenty Republicans. On October 28, 1985, Senator Orrin G. Hatch (R-UT) introduced a Senate version of the bill (S.1815). If enacted, the Polygraph Protection Act of 1985 would outlaw the use of lie detectors in the private sector. This legislation would include not only polygraphs, but also deceptographs, voice stress analyzers, psychological stress evaluators, and other devices. It would also provide for fines of up to $10,000 for any person found to be violating its provisions. Enforcement power would rest with the US Department of Labor and the Secretary could seek a court order to restrain any employer from violating the act. In addition, an individual could bring an action against an employer who violated the act.

A review of the testimony presented to the Congress by supporters of the Polygraph Protection Act of 1985 can best be summarized as follows:

- More than 50,000 men and women (out of one million) are administered the test annually, fail it, and thus jeopardize their careers.
- Polygraphs are inaccurate; their correct guilty detections range from about 35 to 100 percent.
- Polygraphs are used to harass and intimidate union employees and organizers.
- State courts and legislatures cannot adequately regulate the industry, thus making it necessary for federal intervention.

We at ASIS find no substance for these arguments. To be candid, they are flawed. We say this not because our members have a vested or financial interest in lie detectors--the overwhelming majority of our members do not--but rather because our review of the existing literature and our own experts tell us otherwise.

We will address the above arguments and then proceed to our own position. First, it can be stated categorically no one in the United States really knows how many lie detector tests are administered annually in the private sector, nor does anyone really know how many persons fail these tests each year. At best, the figures presented are an educated guess. They are not based on any hard data.

Secondly, their experts are no better than ours on the issue of the accuracy of polygraphs. The record is replete with judicial decisions allowing for the admission of polygraph evidence at both the federal and state levels. Further, if some Congressional members are really concerned about the scientific reliability of lie detectors, why exempt the Federal government from the provisions of the Act? Why adapt (H.R.1529) an amendment by Representative Dennis E. Eckort (D-OH) to allow companies that manufacture drugs to use lie detectors in cases involving missing or stolen narcotics? It would appear polygraphs are only scientifically reliable when used by those companies or industries Congress chooses to exempt. We disagree, and take the position that like any technology, lie detectors are only as reliable as the persons that administer the examinations.

We also disagree with the contention local government cannot regulate the licensing and use of lie detectors. More than thirty states now have laws requiring the licensing or certification of polygraph examiners. Another twenty states and the District of Columbia have enacted laws that regulate an employer's use of the polygraph.[11]

The courts have demonstrated a willingness to enforce these laws. For example, in the case of Cook v. Rite Aid Corporation, the Maryland Court of Special Appeals ruled in favor of an employee who had argued she had been administered a test in violation of state law. The court upheld an award of $1.3 million in damages.[12] This decision was hardly an indication local government is neither willing nor able to regulate the use of lie detectors.

I should also add none of the states or their representatives have asked for any federal assistance or intervention in this arena. No local governmental unit has asked Congress to intervene and establish an added layer of bureaucracy in a sphere the states have demonstrated both the ability and willingness to regulate. The present legislation constitutes an infringement on state rights in a field the states have historically regulated with success.

We at ASIS firmly believe the existing state machinery is more than adequate to regulate the licensing and administration of lie detector tests. Creating an additional bureaucratic layer at the federal level is unnecessary and constitutes an added expenditure of taxpayer dollars. These funds could be better used elsewhere.

The act also makes criminals out of millions of business people, especially individuals owning smaller businesses that often rely on polygraph testing to safeguard their assets as well as the health and welfare of the general public. For example, think of the havoc maladjusted employees in key positions could cause the hotel/motel, hospital, and restaurant industries if not properly screened. The existing state machinery is both adequate and in place to do the job. We ask why you would want to dismantle a regulatory edifice that apparently works well?

## The Question is One of State Rights

If S.1815 is eventually enacted into law, under the doctrine of preemption, it will overrule more than forty years of state regulation and judicial decisions. Specifically, S.1815 and its companion bill H.R.1524 pose a direct challenge to both state rights and the federal system. For if we agree lie detectors need federal regulation, then why not apply the same argument to the state licensing and regulation of other professions, the registration of automobiles, or other health and safety-related fields. Carried to its logical conclusion, the argument would signal the demise of meaningful state governance. It could threaten the political power base of the states that has served the nation so well.

More than twenty states now regulate the manner in which private employers employ polygraphs; more than twenty-five states now regulate and license examiners. The following examples indicate states have long recognized the value of the judicious and ethical use of polygraphs:

- ° An examiner is required to inform an examinee in advance as to the nature of the examination.
- ° Limitations are placed on the subjects about which an examiner may ask. For example, questions regarding an examinee's political, religious beliefs or sexual behavior are prohibited.
- ° Examiners found to violate state laws can have their licenses suspended or revoked. They may also become the target of a lawsuit.[13]
- ° Examiners are also prohibited from interfering with the lawful activities of union organizers.

Employers historically have had the right to expect their employees to act in a lawful manner. Is it unreasonable for an employer to weed out thieves, drug dealers, and other malcontents from sensitive positions in the workplace? What reasonable person would oppose private efforts to bar a child molester from a day-care center or drug addict from a hospital pharmacy? Would anyone want an embezzler to handle multimillion dollar EFT transactions? To screen these individuals requires the use of technology; lie detectors have proven themselves to be an economical and reliable vehicle.

The courts seem to agree with our position that lie detector tests, when properly employed, can prove both valuable and reliable. The following decisions give some examples:

- * The Alabama Supreme Court ruled an employer can rightly dismiss an employee who refuses to take a polygraph test during an in-house criminal investigation.[14]
- * Arizona courts have upheld the use of polygraphs;[15] as have those courts of Missouri.[16]

- Federal courts in North Carolina have allowed the results of polygraph tests in evidence.[17]
- The US Seventh Circuit Court of Appeals also allows such evidence at the discretion of the trial court.[18]
- The U.S. Sixth and Eighth Circuits have taken the same stance.[19]

## State Regulation Works

Many states have taken steps to ensure lie detectors are used judiciously. State laws now provide civil remedies for any person wronged by the misuse of lie detectors. Lawsuits for libel, negligence, and malpractice against examiners and employers are now common. The following examples show the courts are willing to uphold cases that have merit:

- An Indiana court allowed an employee who was fired after failing a polygraph test to sue for negligence.[20]
- A Michigan court awarded the plaintiff a $150,000 libel judgement, and a Minnesota court upheld a jury verdict for $60,000 in damages.[21]
- Both New York and Pennsylvania allow actions against employers who fail to administer a polygraph examination within the confines of their statutes.[22]
- Courts have also recognized Title VII claims against employers in this arena.[23]

Given the above, one cannot really say employees are deprived of their civil rights by employers armed with polygraphs. It may make for good cinema, but it bears little resemblance to reality. Employees have adequate remedies under state laws. They also have the option to move to amend these laws. The following evidence demonstrates that statement:

- An examinee must be informed the test is voluntary.
- An examinee may refuse to answer any questions posed during the course of an examination.

- An examinee must be provided with the results of the test upon request.
- An examinee must be given an opportunity to explain his or her reaction or behavior.

The states have also imposed tight controls for licensing examiners. For example, an applicant for a license must demonstrate both educational and professional achievements, as well as be morally fit. Further, an examiner who is convicted of a misdemeanor, demonstrates unethical conduct, or fails to post a surety bond can have his or her license suspended or revoked. The state regulators can also initiate an investigation if an examinee files a formal complaint.

States have demonstrated both an ability and willingness to safeguard employees from polygraph-related abuses. The courts have also recognized the value of this technology when properly employed. Why change things?

## Conclusion

We at ASIS have never taken the position polygraphs are foolproof. On the contrary, the polygraph, like any other technology, suffers from occasional mishaps. However, our position is efforts should be directed at improving them, rather than preventing their use.

Employers are only human. Their primary concern is how best to serve the public and, at the same time, stave off foreign competitors. Unfortunately, the legislation not only serves to undermine these efforts, it also denigrates the valuable role of business in our society. In addition, the bill undermines the traditional role of the states in our political edifice.

In closing, we at ASIS are most grateful to you, Mr. Chairman, and other members of the Committee for the opportunity to make this statement. We also reserve the right to submit additional statements. Further, we request we have the opportunity to offer verbal testimony when the Committee holds hearings on S.1815. Thank you.

## References

1) US Chamber of Commerce, White Collar Crime at 6.

2) American Bar Association, Report on Computer Crime.

3) American Institute of Certified Public Accountants, Report on the Study of EDP-Related Fraud in Banking and Insurance Industries at 7.

4) Theo Stamos, "Insider Cost Retailers More than Shoplifters," Washington Times, December 10, 1985, at 1A and 10A.

5) "Executive Briefing," Security World, November 1985, at 3.

6) Id., at 3.

7) Id., at 3.

8) "Tracing a Labyrinth of Drug Diversion," Security World, November 1985, at 13.

9) US Chamber of Commerce, at 4.

10) US Department of Health and Human Services, Computer-Related Fraud and Abuse in Government Agencies, at i-ii.

11) Richard Paterson, "In Favor of the Polygraph," Security Management, November 1985, at 48-49.

12) Elizabeth Tucker, "Refusal to Take Polygraph Test Leads to Maryland Court Contest," Washington Post, November 18, 1985, at 17.

13) See Food Fair, Inc. v. Anderson (382 So. 2d 150, 1980) where a Florida court allowed a suit for damages against a company for fraudulent statements made by one of its examiners during the course of an examination.

14) Smith v. American Cast Iron Pipe Company (370 So. 2d 283, 1979)

15) Larson v. Motor Supply Corporation (573 P.2d 907, 1977)

16) National Labor Relations v. Fixtures Manufacturing Corporation (669 F.2d 1172, 1983)

17) Jackson v. Garrison (495 F. Supp. 9, 1979)

18) United States v. Penick (496 F.2d 1105, 1974)

19) See Poole v. Perini (659 F.2d 730, 1981); also United States v. Oliver (525 F.2d 731, 1975).

20) Lawson v. Howmet Aluminum Corporation (449 N.E.2d 1172, 1983)

21) *Kamrath v. Surburban National Bank* (363 N.W.2d 108, 1985)

22) See *Zampatori v. United Parcel Service* (479 N.Y.S.2d 470, 1984); *Molush v. Orkin Exterminating Corporation* (547 F. Supp. 54, 1982).

23) *Smith v American Service Company of Atlanta* (35 FEP Cases 1552).

## STATEMENT OF THE ASSOCIATION OF GENERAL MERCHANDISE CHAINS, INC.

The Association of General Merchandise Chains, Inc. (AGMC) supports the continued ability of retail employers to choose, consistent with state law and sound practice, to use polygraphs as a part of their overall loss prevention programs. For that reason, AGMC opposes S. 1815, which would effectively ban private employer use of polygraph and other lie detection tests.

The Association of General Merchandise Chains represents the nation's price-competitive general merchandise retail industry. AGMC's membership includes retail companies that operate more than 20,000 discount, variety, dollar, junior department, family center, off-price, factory outlet, catalog showroom and other general merchandise stores. Its members range in size and include many of the nation's largest retail chains as well as companies active in one or more regions of the country. AGMC member company stores are located in all 50 states and account for over $50 billion in annual sales.

Not all AGMC members employ polygraphs, but the majority of them do, mostly commonly in investigating losses which are suspected of stemming from internal theft.

Although the legislation does not appear to recognize the fact, employee theft is a very large and extremely serious problem for most employers; it is an area of special concern for retail companies.

While all businesses are vulnerable to internal theft, the type of stores operated by AGMC members encounter special challenges in preventing such losses. Primarily self-service, the stores employ large numbers of workers, and handle a high volume of primarily cash purchases; this affords a dishonest employee a multitude of opportunities to steal cash or merchandise.

Many AGMC members have special grounds for concern about a polygraph ban, due to particular merchandise lines where losses could be particularly damaging. Many operate pharmacies within their stores carrying prescription drugs. In the wrong hands, these valuable items are capable of great harm. Retailers with catalog showroom or jewelry stores must be concerned over the very serious damage they could sustain from losses in such areas as gems, precious metals, watches and other easily concealed, high value merchandise.

Our highly competitive industry's modest profit margins mean that any preventable loss will hit harder than it might in a less competitive industry better able to tolerate such losses. In addition, these losses may be passed on to all consumers in the form of higher prices. And a retail company unable to control its shrinkage faces a very bleak future.

Estimates vary on the prevalence and total economic loss from internal theft (a recent National Institute of Justice study found that one-third of the workers surveyed admitted to theft of company property). No matter what the precise figures are, it is undeniable that internal theft constitutes a real, sizable problem that can threaten a retail company's very existence.

Employers have a legitimate right to protect themselves against such losses. The majority of states recognize that polygraphs can play a useful role in deterring crime and preventing economic losses. When judged necessary, these states have shown they are capable of regulating polygraph use to prevent objectionable practices while at the same time permitting controlled polygraph use. By adopting this legislation, Congress would disallow those measured and constructive state actions.

Uncontrolled internal losses can be the death warrant for a company. Depriving employers of an effective tool for controlling losses will only contribute to business failures and the needless loss of jobs.

The Congress has recently expanded the power of military agencies to use polygraphs to protect vital information and to deter criminal misconduct. It would be ironic and very unwise if, on the heels of that action, Congress removed private employers' ability to protect their cash and merchandise from internal theft, and eliminated one of their most effective tools in deterring and detecting employee misconduct.

AGMC strongly urges the Labor and Human Resources Committee to reject the ill-considered proposal to ban private employers' polygraph use.

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AGMC strongly urges the Labor and Human Resources Committee to reject the ill-considered proposal to ban private employers' polygraph use.

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April 23, 1986

The Honorable Orrin G. Hatch
Chairman, Senate Labor & Human Resources Committee
135 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

In reference to your committee's hearings on S 1815 which seeks to ban the use of the polygraph by employers, may I offer some suggestions for your consideration? I am indebted to Marcia Garwood, Ph.D., for her substantive contributions to some of the ideas in this letter.

Congress is concerned about the abuses of the polygraph technique by incompetant or unethichal examiners who invade an applicant's or employee's privacy, and by the prediction of excessive false positive errors which would be expected to occur by even the most competant examiner when the base rate for deception is small. Rather than abolish the employer's right to screen applicants and employees on the polygraph, might it not be fairer to all parties--the individual, the employer, and the public--to regulate the use of the polygraph so as to minimize the abuses and errors while retaining the benefits of a properly administered polygraph program?

Abuses caused by incompetant or unethical examiners can be minimized by the following actions:

1. Require all polygraph examiners to be licensed. This assures that the state is able to set appropriate standards for both the examination and those who conduct them, and to prohibit substandard examiners from practicing. Thirty states presently require examiners to be licensed or certified, and an additional state certifies examiners on a voluntary basis.

2. Ensure that all persons taking a polygraph examination be informed in writing that if they have any complaints they may bring them before the licensing board for investigation. This is an effective means of ensuring that improper practices will be brought to the board's attention. Of course, the board would be empowered to periodically inspect each examiner's records to verify that each subject has acknowledged reading the notification by signing it. Such a notice might be worded as follows:

"If I feel that the examination or the examiner was not completely fair, objective, and professional, I am encouraged to discuss the matter with the Polygraph Licensing Board, 2500 Main Street, Capital City. Their telephone number is ________________. This board regulates all polygraph examiners in the state in order to protect me against any improper practices. The examiner must give me a copy of this notice should I ever wish to have it, either now or at any time in the future. My signature below indicates that I have read and understand this notice."

3. The licensing rules and regulations could also regulate other aspects of the examination, such as specifying standards for the minimum time for an examination. the minimum number of charts that must be obtained, and the maximum number of tests that can be conducted per examiner per day.

4. The licensing regulations could also require that all polygraph examinations be tape recorded in their entirety, and that all records arising from the examination, including the audio tape, be maintained for a reasonable period of time to allow the licensing board to review any test about which a complaint was received. It is important for any reviewer to have an audio tape available in order to evaluate the interaction between the examiner and the subject during the pretest interview and to determine whether all parts of the test were properly administered.

There are also a number of practical steps that can be taken to reduce the possibility of false positive errors. These might include:

1. Increase the number of charts that must be obtained prior to a decision of deception. For example, if two charts are sufficient in a screening situation to justify a decisiion that the subject was truthful, it would seem prudent that three charts might be required to justify a decision of deception. That would reduce the likelihood of an error caused by random nervousness by ensuring that the reactions must be sufficiently consistent.

2. Whenever consistent emotional reactions to a specific question are observed, the subject should be allowed to explain what he was thinking about when the question was asked. The question should then be reworded taking that explanation into account, and additional charts obtained. Only if the reactions persisted on the second half of the examination would the examiner be allowed to report that the person could not be cleared on a given question. It would thus require two consecutive false positive errors on the part of a truthful person before it would be reported to the employer.

3. Any person who had not been cleared on the polygraph test would be permitted to be re-examined at no expense to himself. As with the first test, if the person still reacts consistently to any question on the test, he would again be allowed the opportunity to explain what may be causing the reactions, and the testing would be resumed. As with the first test, it would again take two consecutive false positive errors before a truthful person would be reported as reacting to a given question. If at any one of these four decision-making points in the two examinations the subject were to appear truthful, he would be so reported. In those cases in which the person requests a re-examination, four consecutive false positive errors would have to occur before any action would be

taken on an error. This procedure reduces the possibility of a false positive outcome at the expense of increasing false negative errors, for the deceptive person would also have three additional chances of being reported truthful. While that may not be desirable in national security cases, it would seem a reasonable trade-off in the private sector.

4. Should the person who took the test(s) wish to have another opinion, there should be a quality control procedure for reviewing the test(s). The quality control could be accomplished either by the polygraph licensing board directly (paid by the state), or by an examiner approved by the board (paid by the employer). The quality control need not be limited to a re-evaluation of the polygraph charts, but could also include a review of the audio tape of the entire examination to ensure the pretest interview and other procedures were properly conducted.

It is obvious that raising the standards to be met by the private polygraph sector is going to increase the cost of the examinations which, in turn, may decrease the number of examinations being conducted. However, considering the costs and the benefits, I believe that both the individual and the public would benefit more from having the standards raised than by banning the use of the polygraph in the private sector.

If it is not improper for me to do so, I should like to request that my comments be included in the record. Thank you.

Sincerely yours,

Gordon H. Barland

Gordon H. Barland, Ph.D.

## STATEMENT OF WILLIAM L. COLE

Mr. Chairman, Members of the Senate Labor and Human Resources Committee:

My name is William L. Cole. I have been involved in the management and administration of the security service industry for over 30 years. Presently, I am a security consultant to Wells Fargo Armored Service Corporation, Wells Fargo Guard Services and Burns International Security Services, all wholly owned subsidiaries of the Borg-Warner corporation and I am submitting these comments on their behalf.

I would like to thank the Chairman and members of the Committee for the opportunity to comment on S. 1815. I had the privilege of testifying before the House Labor Subcommittee on Employment Opportunities when that subcommittee considered H.R. 1524, sponsored by Representative Pat Williams. Mr. Williams agreed to an amendment offered by Reps. Roukema and Biaggi which exempted protective security services. Mr. Williams felt this amendment was necessary, "to establish symmetry between what we allow in the public sector in the way of polygraphing and what we allow in the private sector." In her comments prior to introducing the amendment, Mrs. Roukema stated that, "Even if you believe there is a need for this bill's prohibitions you must realize that there are certain interests which are so sensitive to both the employer and the society at large that we must provide some additional protection to those employers....our national security goes well beyond the operations of the Federal Government and is affected by strictly private-sector functions such as the transportation of currency and the operation of certain facilities such as airports. The threat of terrorism alone warrants our permitting additional flexibility in establishing security measures in these areas."

Representatives Williams, Roukema and Biaggi all make compelling statements in support of the protective services exemptions. Their complete statements can be found in the March 12, 1986 Congressional Record. I think it would be helpful at this point to recount, for the Committee's record, the nature of our business in protective security services and to illustrate why the polygraph, when properly administered, is a useful investigative tool.

Borg-Warner Protective Services operates in 44 states and Puerto Rico. They employ over 39,000 people. In the armored business, we operate 1,200 armored trucks and vehicles servicing the Federal Reserve, the Bureau of Engraving, financial institutions, including money room services and automatic teller machines, and commercial/retail establishments. On any given day, Wells Fargo will handle $1 billion through transportation, inventory and storage services.

As custodians of a customer's money and protector of their interests, we have an obligation to do everything in our power to insure that the trust placed in us is not abused. More than 65 percent of total losses in the armored car industry are the result of internal theft. Thus, it is imperative that we use every measure possible in an effort to recruit and hire employees whose honesty and integrity is unquestioned.

Our Burns International Security Services Division and Wells Fargo Guard Division are actually required by their customers, in many cases, to perform pre-employment polygraph screening. Burns International, for instance, is a major supplier of guard services to nuclear facilities. This group pro~~j~~tects 25 nuclear facilities throughout the country, employing over 3,000 guards in the process.

Burns is contractually required to provide polygraph testing for over 95% of them. Likewise, the Wells Fargo Guard Division is a prime contractor to the Department of Energy. This group provides security to all the U.S. Government's Strategic Petroleum Reserve sites throughout the country. These guards are highly trained and must have secret clearance. As a contractual requirement imposed by the Department of Energy, all guards assigned to those sites must pass a pre-employment polygraph test.

Borg-Warner shares the concern that individuals not be denied employment unfairly or have their privacy invaded. We are, however, convinced that a polygraph test is accurate more than 90 percent of the time in cases where trained examiners are able to reach a conclusion about a person's truthfulness. Moreover, we believe that the threat of polygraph testing serves as a deterrent to potentially dishonest employees.

For these reasons, corporate policy allows the use of polygraph examinations in applicant screening, periodic testing, and with reference to specific events. That policy includes rigorous controls, which go beyond state requirements in most instances. At _no_ time does applicant screening involve _any_ question regarding religion, attitude toward unions, political beliefs, sexual behavior, or other personal issues. The test is meant to confirm the accuracy and truthfulness of the applicant's stated background, employment history, and reason for seeking a position with the company. It is only one step in a process which includes interviews, verification of prior employment, and other checks which are necessary prior to offering an applicant a job.

Even where state investigation and approval are required for security guards, pre-employment testing is an efficient screening mechanism to help prevent individuals with criminal arrest records from getting on our payroll. In New York, for instance, all guards must be fingerprinted and complete an application which must then be approved and processed by the state. If this processing discloses a criminal arrest record, the state advises the employer to terminate the employee. The problem is that it takes more than four months to obtain state clearance. Meanwhile, we could have a convicted felon on our payroll, assigned to protect a customer's highly valued assets. In order to adequately protect our customers and insure against what might otherwise be a significant liability exposure, we feel it is crucial to have the ability to do pre-employment testing.

Once hired, many employees must agree to periodic testing as a condition of continued employment. It is used most commonly in situations where an employee is involved in handling a customer's funds in what we call "an open bag situation," namely a money room or consolidation service, automatic teller machine service, or maintenance of currency inventory for a financial institution. The objective is to insure honesty on the job by having all employees know that they may be subject to an unannounced random polygraph test at any time in the future.

Wells Fargo Armored uses specific polygraph tests only if authorized by a regional general manager and the director of security as part of the investigation of a loss of customer funds. In most cases, such an investigation is coordinated with local law enforcement personnel, the FBI, and/or the United States Secret Service. Again, purpose of the specific polygraph test is to confirm information given by the employee when interviewed regarding the disappearance of funds. Employees are never terminated based on polygraph results alone. In fact, in some cases our employees favor the use of an examination to help establish their credibility.

Borg-Warner is extremely careful in its polygraph testing. We use only qualified, state certified polygraph examiners, preferably members of the American Polygraph Association with prior law enforcement experience. In 1984 we administered approximately 700 tests to applicants for jobs, 50 random tests, and at least 200 specific tests. We are confident that the nature of our business and the demands of our customers warrant such rigorous review of potential employees.

Now that I have described our rationale for using polygraph testing and our strict controls on its use, I would like to comment on a number of recent trends in criminal activity in our business which we believe stem from inside information. These illustrations provide good examples of the types of situations where polygraph examinations can be an effective tool in crime solving and crime prevention.

In 1983 there were multi-million dollar robberies from our West Hartford and Memphis terminals. The FBI solved our Memphis loss with the identification of an employee who was involved with her brother, a former New Orleans police officer. The West Hartford loss involved an employee who is presently being sought by the FBI as a "Top Ten" fugitive. The Puerto Rican based Matcheteros have taken credit for planting him in our Wells Fargo terminal in Connecticut and are believed to be in possession of the stolen money.

Connecticut law did not allow us to administer applicant polygraphs and, therefore, we were unable to identify a person whose intention was not to seek legitimate employment. Both of these cases point out the connection between employee involvement and major losses in our industry.

Law enforcement officials on several occasions have recovered documents which indicate that terrorists groups in the United States intend to fund their activities by robbing financial institutions and the armored industry. The FBI and the police department in Dade County, Florida currently have a joint task force investigating a Marielito gang operating in south Florida. This group which is suspected of the murder of a Wells Fargo employee on June 21, 1985, has plagued the armored industry in Dade County with at least seven successful attacks since 1982. It appears to have contacts inside the armored companies and plan to have additional members seek employment. Without the use of polygraphs to screen applicants, more such attacks will undoubtedly occur.

The well publicized increase in use of cocaine and other drugs in our country is a problem for all employers. We are especially concerned that we identify cocaine users in order to protect the resources of our clients.

The large number of robberies lately has created a new problem for our industry - the disappearance of insurance coverage. At this time, only a few companies are still willing to provide coverage and then at much higher premiums and deductibles. In order to stay in business, we must pass such cost increases on to our customers, who in turn pass them on to the American public.

The above cases demonstrate how, when properly administered, the polygraph examination can be a useful tool in detecting and preventing criminal activity in our special business. The House, in the Roukema-Biaggi amendment, recognized that the use of polygraph tests is appropriate in our business.

In conclusion, we believe that Borg-Warner's current practice fully protects potential employees from abuse by polygraph examiners. In addition, we stand ready to support proposals to strengthen training and licensing requirements if there is a consensus that such requirements are necessary.

COIN DEPOT
CORPORATION

April 4, 1986

The Honorable Orrin G. Hatch
U.S. Senate
Washington, DC 20510

Subj: S.1815, Polygraph/Armored Car Industry
S.1018, 9(b)(3) NLRA

Ref:
(a) President's Crime Commission Report, dated 1/14/86
(b) Congressional Record, House Employee Polygraph Protection Act of 1985
(c) FBI reports to our industry
(d) 25 years experience

Dear Senator Hatch,

Our company is small - annual sales 20 million - but our industry is tiny as a function of G.N.P., grossing collectively in this country no more than 600 million but however, responsible for the movement of every physical dollar, on a daily basis - in the United States.

A disruption of the flow of currency, irrespective of the fact of electronic funds transfer (EFT) or wire transfers - could immobilize the country as quickly as a cessation in the supply of food.

These facts constitute the basis for two arguments: One - to retain the 'protective covenant' in the NLRA referred to as 9(b)(3) in your S.1018 which reduces the possiblility of strikes in our industry; and, two - to retain the right to use the polygraph as an investigative tool, in searching for thieves, mobsters and terrorist oriented types - in our ranks.

I allude to all four references when I suggest that your committee vote in our favor on S.1815 and S.1018.

Reference (a)points out clearly the relationship between organized crime and certain Teamster involvement.

Reference (b) makes obvious two facts:

1. The government recognizes the value of the polygraph as a credible investigative tool and the detractors refer to it as voodoo when it comes to usage by the private sector - contrary to the opinion offered by Mr. Martinez in reference (b);

2. Employers cannot find the thieves by "sound audition and personnel screening practices" -

Reference (c) FBI reports to the Armored Car Industry simply stated are: that armored trucks are the target of extreme radical terrorist organizations in this country - we are in fact soft or vulnerable to them and need every tool at our command to reduce the chance of having one of them in our midst.

Reference (d) is self-explanatory - I've been a hands-on operational owner operator of my company since it's day of inception 27 years ago.

This request to you, is offered in the same rationale - to protect or guarantee the orderly flow of funds in this country - without intrusion into the rights of employees.

Consider this: "Employees vote for the right to be subjected to polygraph tests". If our people were polled on their opinion of the value of the polygraph, to our company (or industry), I can assure you that their response - due to 25 years of usage, would go like this:

"We deserve the right to maintain the availablility of a tool - that has proved effective in ridding ourselves (and hence our company) of 'bad apples' (thieves)".

This is a rare opportunity and if lost deprives us of the competitive advantage - over those who have deliberately sought - for whatever reason - not to use this tool.

Our workers are not unsophisticated in this respect - they've seen the relationship between being forced to harbor thieves and the loss of contracts.

Perfect example: Brinks recently lost the contract to collect 65,000 parking meters in New York City when they were caught (by the City) stealing some 2 million per year of revenues. They - Brinks - lost; we - Coin Depot won - logic:

Given two choices as an employee:

1. Use the polygraph to selectively rid the company of thieves - and keep good contracts; or

2. Deny the company this investigative tool (vis-a-vis the Brinks example) and lose the contract.

Respectfully,

H.J. Koehler, III
Owner, CDC Systems

HJK/dk

TESTIMONY OF
RUBEN DANKOFF, CHAIRMAN
LEGISLATIVE COMMITTEE
BOWLING PROPRIETORS' ASSOCIATION OF AMERICA
BEFORE THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
April 23, 1986

## SENATE BILL 1815

Mr. Chairman, Members of the Committee on Labor and Human Resources, I wish to thank you for allowing me the opportunity to submit written testimony in opposition to S-1815.

My name is Ruben Dankoff and I am Vice President and Chairman of the Legislative Committee of the Bowling Proprietors' Association of America. Our Association has over 5,000 members engaged in the operation of bowling centers throughout the United States. We represent the largest participant sport in the United States with many of your wives and children as our customers. We are composed, in the main, of small family-oriented businesses. Our bowling centers have grown from the establishments of the 20's and 30's to relatively large complexes that encompass restaurant facilities, other sporting amenities, and day-care centers to service our customers. Over the past 20 years we have emerged as a major exercise and social center not only for the youth of our country but for countless housewives and young professionals who make up our society. The security of our clientele has always been a major concern of our membership. It is your wives, your children, your parents, and millions of senior citizens that we seek to protect. Our business interests have determined that day care for infants and small children is a vital aspect in the success of our operations. It allows the housewife to bring her children with her to our centers and to enjoy the benefits of a few hours of exercise and social contact with her peers while at the same time knowing that the children are safe and well-cared for in our day care centers. The same situation applies for adolescents.

This places a tremendous burden upon the operators of our bowling centers, but one which we cheerfully accept. It does, however, require that we must be constantly alert to assure that our employees are people of good moral character, that they have a history that is unblemished by perversity or criminal misconduct.

Similar to many small business operations most of our association members operate on a marginal profit basis. We have neither the capability nor the capacity to conduct extensive background investigations prior to hiring an employee. We have an average of 40 employees in most of our 5,000 bowling centers. Many of them are part-time. The only way we can keep track of discrepancies or missing funds is the occasional use of a polygraph. We never attempt to operate a polygraph machine ourselves. We call upon those who are professional qualified. We know that the polygraph is not perfect, but it is a tool useful in background checks. We can understand your concern that an applicant for a position may be adversely affected because of mechanical inadequacies or unprofessional operation of these devices. But we are asking you to balance the equities of the situation. A single act of violence against a child entrusted to our care or to a housewife bowling in one of our centers should surely outweigh the inconvenience to a job applicant. An error in the utilization or interpretation of a polygraph can be corrected. The applicant can still work elsewhere. The history of the types of assaults we have noted is not comparable in long-range traumatic effect. We feel strongly that our clientele would be exposed to great danger if we were denied the use of a polygraph.

We do ask the Committee to take these matters into consideration and to allow our members to continue to conduct their business with some assurance that we can protect our clientele as we have in the past.

Thank you for allowing me to present this testimony on behalf of the Bowling Proprietors' Association of America.

**Building Service Contractors Association International**

BUILDING SERVICE CONTRACTORS • BSCA • ASSOCIATION INTERNATIONAL

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Executive Vice President
CAROL A. DEAN

March 4, 1986

Senator Orrin J. Hatch
Chairman
Senate Labor and Human Resources Committee
Dirksen 428
Washington, D.C. 20510

Dear Senator Hatch:

The Building Service Contractors Association International is very interested in the "Polygraph Protection Act" (S.1815) and similar legislation (H.R.1524/H.R.3916) pending in the House of Representatives. BSCA International is an association of companies predominantly involved in the contracting of janitorial services. Additionally, our industry provides a variety of services to office buildings, industrial plants, hospitals, homes, and virtually every type of building.

We are concerned about and oppose S.1815 as well as H.R.1524, which is pending in the House. We feel that it is not within the authority of the federal government to ban the use of polygraph testing, but rather such a regulation is a responsibility that rightfully lies with individual state governments. For that reason we oppose the attempt by the federal government to prohibit polygraph testing in the private sector on a national basis.

Contractors in our industry are faced with a unique problem that can be addressed and remedied somewhat through polygraph testing. Frequently, building service contractors are required to deal with allegations by tenants and clients that our employees are responsible for theft in their offices or buildings. This is a knee-jerk reaction that is often the first explanation offered in cases of disappearance of items and theft in an office or within a building. Tenants have a tendency to suspect and accuse the "janitor" of theft because the janitor oftentimes performs his job functions after the tenants' business hours.

While we cannot claim that it never occurs, there are occasional occurences, it has been our experience that in the large majority of cases our employees are innocent. The problem of unsubstantiated accusations is an acute one in our industry, and we must be able to adequately address it when accusations occur.

We can address this problem through the use of polygraph testing. Contractors must make every effort to prevent theft by hiring honest employees and then by providing proper training and supervision, otherwise the contractor could not remain in business. However, when disappearances and theft do occur and our employees are suspected, contractors in states in which polygraph testing is permitted can make use of the testing in order to prove the innocence of and exonerate their employees. For that reason polygraph testing can be a valuable tool for building service contractors and their employees.

As indicated above we oppose any efforts to ban the use of polygraph testing as proposed in S.1815 and H.R.1524. We do support many of the measures proposed in H.R.3916, which is also pending in the House. Because polygraph testing is valuable within our industry we feel it must be administered properly to be effective. Also, we feel that the rights of the individuals being tested must be protected, and we support proposals to these ends.

H.R.3916 is such a proposal. It would allow the use of testing but would regulate it and provide individuals with essential protections. This proposal would make testing voluntary on the part of the individual being tested; would prohibit questions regarding beliefs on religion, race, politics, sexual preference, and union attitudes; would allow the examinee to terminate the test at any time and to be entitled to a signed copy of all opinions or conclusions of the test; and would prevent an employer from taking action regarding the employment status of an employee based solely on opinions and conclusions of a polygraph examiner. Also, the bill would establish very sound standards for polygraph examinations and examiners.

However, we object to the provision that would provide to the examinee prior to the test all questions, in written form, to be asked. Such a practice would dilute the effectiveness of the testing by allowing the examinees to prepare for the questions. With this exception we feel that H.R.3916 is a good alternative to an outright ban on polygraph testing in the private sector.

For the reasons stated above we urge that the Labor and Human Resources Committee reject S.1815 and H.R.1524 and any attempts by the federal government to prohibit polygraph testing. Rather, we recommend that the Committee review and accept the sound principles offered in H.R.3916, which are designed to protect the rights of employees and to improve the quality of polygraph testing while allowing individual state governments the authority to rule on the legality of its use.

Sincerely,

Jerry Davis

Jerry Davis, Jr., CBSE
President

JD:jcb

cc: Gary A. Penrod, CBSE, President-elect
James S. Netterstrom, CBSE, Chairman,
BSCA Government Affairs Committee
Carol A. Dean, Executive Vice President
Senate Labor and Human Resources Committee

Designer Jewels, Inc.
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April 7, 1986

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
428 - Dirksen Senate Office Bldg.
Washington, D.C. 20510

Attn: Chairman Orrin G. Hatch

Dear Chairman Hatch:

We are a very small business with less than ten employees. Because of a very bitter experience several years ago, we began the pre-employment polygraph test.

In the past several years, we have been shocked to learn some of the bad facts of life of potential employees. For instance, a charming, skilled young lady whose two-year previous employer raved about was found to be his "silent partner" -- a thief as well as a habitual drug addict. And then there was the young skilled mechanical jeweler, who in the previous five years stole from everyone -- the jewelry firm, his original employer and even his own brother who was helping him by employing him!

We are not concerned with the after hours social, political or cultural pleasures of our employees. We have enjoyed hiring people of every major race, creed, color and of both sexes for many years and plan to continue doing so in the future. Thankfully, we have a very low turnover rate.

The use of this pre-employment screening tool, the polygraph test, is absolutely PRICELESS to our company.

If it's O.K. for Uncle Sam, why not this tax-paying, ex-veteran citizen?

Very truly,

HR Sandler

H. ROBERT SANDLER
DESIGNER JEWELS, INC.

HRS:av

DIAMONDS INTERNATIONAL AWARD

FARADAY NATIONAL
CORPORATION

13854 Park Center Road, Herndon, Virginia 22071
Telephone (703) 435-0100

A Member of The De La Rue Group of Companies

April 15, 1986

Gentlemen:

My name is Clare Stanford. I am president of Faraday National Corporation, a wholly owned subsidiary of The De La Rue Company, plc. Faraday National is located at 13854 Park Center Road in Herndon, Virginia.

The primary business of Faraday National is the manufacturing and personalizing of plastic cards for financial institutions in all of the United States. These cards are typically MasterCard, VISA, or private label Automatic Teller Machine cards.

The essence of our successful relationships is complete customer confidence in the confidentiality and security of our operation.

For the past 15 years, we have screened all potential employees using a state licensed polygrapher. In addition, once a year all employees are rescreened. The officers of the company are given the polygraph test first, and then all other employees are tested.

We have found the polygraph test to be extremely useful in identifying current drug users and persons who have falsified their employment form. Our questions are compatible with state requirements that questions are necessary and work related and that they do not infringe on personal rights.

One major advantage, appreciated by our employees, is the strong confidence in employee integrity we can exhibit in plant procedures as a result of the polygraph tests.

Faraday is perhaps the only major card manufacturer and processor in the United States that has not had internal fraud. There is no doubt that this is largely the result of our superior personnel which reflect our corporate personality and screening technique.

I strongly suggest that the polygraph test is a proper and necessary tool in conducting business where security is a cornerstone in serving a vital business. Procedures to insure that the tests are used under proper control are desirable.

Faraday National would be pleased to have members of the Committee on Labor and Human Resources tour our facility and speak in private to any of our employees relative to our usage of polygraph tests.

Sincerely,

C. Stanford

C. P. Stanford
President

FLORIDA DEPARTMENT OF STATE
George Firestone
Secretary of State

## POLYGRAPH POSITION STATEMENT

by

Florida Secretary of State George Firestone

Recent congressional activities have raised questions as to the propriety of polygraph usage by business and what its proper role should be in the business and labor communities. As the state official ultimately responsible for the regulation of this industry, I deem it necessary and appropriate to present the following comments.

The State of Florida began regulating the polygraph industry with the enactment of statutes in 1967. Polygraph, as with other professions, fulfills a demonstrated need of the public. Polygraph provides a necessary method of objectively determining truth. It is imperative that services, which by their very nature pose a possible risk to the public, be strictly controlled to assure the protection of the public. To this essential objective, the Secretary of State's office is cnarged with establishing and enforcing standards, restrictions and practices by which the polygraph industry must operate or encounter appropriate consequences.

The Capitol · Tallahassee, Florida 32301 · (904) 488-3680

I have a personal interest in the effective regulation of polygraph since, as a state legislator, I was directly involved with the enactment of polygraph legislation almost twenty years ago. Since that time, I have witnessed the many positive contributions that regulated polygraph has provided to both business and labor.

Concurrently, the number of complaints against examiners has been negligible. There are 519 fully licensed examiners in Florida who conduct over 300,000 tests annually. State law mandates that each subject be notified of his right to file a complaint with this Department. Despite this fact, only one validated complaint against an examiner has been filed in the past year. One must conclude that an informed public does not share the purported perception of misconduct within the profession.

Florida is a particularly transient state where background investigations are frequently impossible to perform. Proponents of SB 1815 have suggested that such background investigations would offset the requirement for polygraph in pre-employment screening. In reality, the possibility of obtaining pertinent background information has been greatly reduced. Increasing numbers of liability litigations involving negative references by previous employers have discouraged the practice of providing references regarding performance habits. Applicants will generally omit negative references and provide only positive references or, in most cases, none at all, which may result in critical information not being exposed to the potential employer.

Residents who have transferred from other states often have great difficulty in finding employment because of their inability to establish proof of good moral character and verification of previous employment behavior. This problem is exacerbated in urban areas where Latin, Haitian and other immigrants are prevalent. Unfortunately, it is frequently difficult for proprietors, unable to obtain accurate background information, to differentiate between the criminal element and those who seek a productive place in our society. Polygraph provides the business sector an objective method of minimizing risk to itself and the public by assuring the integrity of potential employees. This is especially useful where the absence of any other references might otherwise negate the possibility of employment. Polygraph acts as a deterrent against those with culpable backgrounds who realize the probability of exposure through polygraph, where it might otherwise go unchecked.

Recent litigation has also established the obligation of businesses to conduct adequate background evaluations to assure the protection of the public. Rulings from several cases nationwide support this statement. One recent pending suit involves a carpet cleaning company whose employee raped and murdered the child of a client. The proprietor has been sued for failure to perform adequate employment screening, specifically for not using an available resource -- polygraph. The courts have consistently concluded that background verification and performance factors are crucial in determining the integrity of a potential employee where the business is entrusted with access to the home or personal property of the public.

In the absence of polygraph, proprietors may be forced to lay the burden of proof in background verification on the applicant in order to be eligible for employment. This alternative, should it prove to be the only recourse, would drastically reduce employment opportunities for immigrants and other applicants who have not yet established long-term residence, but who, if provided the opportunity to establish integrity, could contribute positively to the labor force.

Several examples can be cited where polygraph has not only benefited management, but has also favorably supported labor:

** Cash shortage by bank teller; employer forced to take punitive action ranging from transfer to dismissal. Employee remains under cloud of guilt with no recourse in the absence of polygraph.

** An inference of wrongdoing arises; more than one person is accountable. Employer is forced to respond by multiple dismissals in the absence of polygraph.

** Employee is in service-related business (e.g. hotel, pest control) and is accused of theft. Employer is forced to dismiss in the absence of a truth-finder, polygraph. (It is not uncommon for clients to subsequently advise employer that the object thought to have been stolen had only been misplaced.)

** Applicant for position has an unfavorable employer reference resulting from unwarranted confrontation. In the absence of polygraph, prospective employer has no means of determining if applicant is truthful in order to make an objective hiring decision.

Prohibiting the use of polygraph would remove one of the only safeguards an employee has with which he can exonerate himself of suspicion or accusation.

Studies have consistently shown that culpable employee actions result in a major cost increase to businesses, an increase which is ultimately passed on to the consumer. A 1977 United States Department of Commerce study indicated that costs resulting from employee crime amounted to $43 billion annually. A 1983 survey conducted by the National Institute of Justice, United States Department of Justice, used a random sample of employees at all occupational levels from 47 corporations. Based on anonymous responses, the study revealed that one-third of the employees admitted to stealing from the company. Two-thirds of the group admitted guilt in other types of misconduct including drug abuse, falsification of time sheets and sick leave abuse.

The fallacy of using reference checks as a substitute for polygraph is evidenced in a Minnesota court ruling. A tenant of an apartment complex brought suit against the complex owner after being sexually assaulted by the manager. The manager, who had a criminal record and was on parole at the time he submitted his employment application, gave two references. They were subsequently determined to be his mother ans sister. The court ruled negligent hiring in that the employment screening was not commensurate with the degree of risk posed by the employee's position.

I concur that the public has a right to privacy and that this right must be protected. I believe that, with stringent regulation, this protection can be provided without prohibiting the use of a service which has consistently proven that its merit to society outweighs its risk.

It is a fact that polygraph has been condoned and its use increased in the interest of national security. In the wake of the Walker spy trial the Congress sanctioned increased use of polygaph in the screening of government employees. By a vote of 331 to 71, the House recognized the effectiveness, validity and propriety of polygraph use in the national interest. In light of such recognition, their current position that the use of polygraph should be denied to American business is untenable. To further compound the situation, HR 1524 provides exemptions not only for employees of all levels of government, but also for certain select industries including pharmaceuticals, armored car guards, security guards, day care and nursing home employees and gambling casino emplyees.

Can we selectively protect certain rights of labor, government and business while denying the same rights to other select groups? HR 1524 accepts the validity, accuracy and propriety of polygraph use for some interests, but not for others. Cash handlers such as armored car personnel and gambling casino employees are exempted from the bill, while others such as bank tellers and grocery store cash handlers are not. Is a bank teller, being in a position to take or be a party to the theft of funds, any less a security risk than the armored car personnel who guards it? Conversely, doesn't the armored car employee have the same constitutional right to privacy as the bank empoyee? If the basis for the proposed virtual prohibition of polygraph in the private sector is contingent on constitutional rights, that position must hold constant for the rights of all prospective employees in both the public and private sectors. The reason suggested for exempting gambling casino employees from the restrictions of HR 1524 was that these employees could be laundering drug money. Doesn't this same situation apply to bank employees to an even greater degree?

As one of twenty-eight states with polygraph licensing laws, the State of Florida is aggressively pursuing the reduction of potential abuse of polygraph by proposing even stronger legislation than that currently in place. It is my personal and professional belief that polygraph serves a vital interest to all sectors and provides an essential method for the exoneration of guilt as well as the confirmation of deception. As in all professions which serve the public, regulation, not prohibition, is the key to protection.

## STATEMENT OF NANCY HARPER, PRESIDENT, HARPER TRUCKING CO., RALEIGH, N.C.

Mr. Chairman, my name is Nancy Harper. I am President of Harper Trucking Company in Raleigh, North Carolina. As President of the company, I have complete responsibility for the operations of our trucking facility and the services we provide to our customers in transporting goods.

I appreciate this opportunity to present my views to your committee.

I have examined S.1815, the Polygraph Protection Act of 1985. Although I am not an attorney, I have discussed this bill with my attorneys. As I understand it, Mr. Chairman, S.1815 would prohibit Harper Trucking Company from polygraphing its employees or anyone we were considering hiring. I am deeply troubled by this proposal because it would have serious ramifications for my company.

Harper Trucking Company hauls, stores, sorts, loads, and unloads quantities of controlled substances on a daily basis. The drugs my employees handle and haul each day have a tremendous resale market on the street. Let me give you one example. On one occasion a box of dilaudid was missing from one of our shipments. Dilaudid is a narcotic prescribed for individuals with extreme pain. The authorities told me that the missing box, which contained 300 tablets of dilaudid, would sell for about

$60.00 to a pharmicist, but its street value was between $10,000 and $15,000.

The only way for me to run my business is to employ people I trust implicitly. And the only way to establish that trust is through the use of lie detector tests. My employees who have nothing to hide don't mind the examinations. In fact, the examinations are a means of protecting their jobs.

I always polygraph prospective employees because I can't afford to have working for me individuals who have an undisclosed record of drug abuse, drug sales, or theft from previous employers. I cannot take the risk of hiring someone who has been or may become involved with organized crime or who might conduct a drug sale operation of his own by stealing the controlled substances handled in our warehouse by our employees.

The frequent polygraphing examinations serve to remind my employees of the special nature of our work and their jobs. My employees know that our company's reputation and their individual reputations are unlikely to be sullied by an employee who does not share our commitment to providing good services and obeying the law.

Harper Trucking Company also ships firearms and ammunition. The same arguments that apply to the drug problem apply to this potential problem as well. Before we began our polygraph testing program, we experienced theft of firearms. Since instituting routine polygraph testing, however, we have not suffered a single theft of firearms or ammunition.

We urge the Committee to exempt employers whose employees handle or transport controlled substances.

We also urge the Committee to exempt employers whose employees handle or transport firearms or ammunition.

We have one other reason for polygraphing employees that is not unique to Harper Trucking Company, but that addresses a concern shared by all common carriers. We routinely include questions in our polygraph testing about the drivers' obedience to state and federal laws, including those that require logs that reflect driving times and rest periods. I strictly forbid any violation of law by my drivers. Most, knowing they will be polygraphed, abide by the laws.

We also polygraph our drivers to insure they do not use drugs or alcohol on the highways. If any of my drivers are found to use drugs or alcohol, they are terminated immediately. Our polygraph tests are an effective deterrent to drug and alcohol use by our drivers.

We recommend the Committee include in its bill amendments exempting common carriers from polygraphing employees or prospective employees concerning the operation of vehicles for hire.

Mr. Chairman, I run a small business. We employ 65 people. Quite frankly I do not see how I can continue to run my business if I am not allowed to use polygraph testing. We respect the dignity of our workers and do not inquire into matters outside the realm of the employment and the job performance. Due to the nature of our work, I cannot comply with applicable law or feel comfortable that I am doing everythng to prevent endangering the public without using the polygraph tests.

Thank you for allowing me to present this testimony.

FMI
FOOD MARKETING INSTITUTE

1750 K STREET, N.W.
WASHINGTON, D.C. 20006

TELEPHONE (202) 452-8444
TELEX 892722 FMI USA WSH

April 30, 1986

The Honorable Orrin G. Hatch
Chairman
Committee on Labor
  and Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

FMI appreciates the opportunity to submit comments to be included in the April 23rd Hearing Record on S. 1815, the Polygraph Bill.

The Food Marketing Institute (FMI) is a nonprofit association that conducts programs in research, education and public affairs on behalf of its 1,500 members -- food retailers and wholesalers and their customers in the United States. FMI's member companies operate more than 17,000 retail food stores with a combined annual sales volume of $150 billion -- more than half of all grocery sales in the United States. More than three-fourths of the FMI's membership is composed of independent supermarket operators or small regional firms.

Theft, or shrinkage, is one of the most serious threats to the successful operation of a supermarket. Because the retail grocery industry operates on a slender one percent profit margin, FMI members are deeply concerned about controlling shrinkage. The costs of shrinkage, as is the case with all operational cost, must eventually be passed onto the consumer in the form of higher prices. In the fourth annual Study of Inventory Shrinkage Control and Security Procedures conducted for the National Mass Retailing Institute, in 1984, Arthur Young and Company found that 65% of food retailing shrinkage could be attributed to employee theft, 13% to poor paperwork control and 22% to shoplifting. In other words, two thirds of all losses of inventory result from actions by employees. This is a controllable cost and it must be controlled.

Due to this unusual rate of employee theft, FMI's members use polygraph tests for both pre-employment screening and investigation of theft when it occurs. In addition to background checks, credit and reference checks, the polygraph is one additional tool used to promote the hiring of better quality employees. By using the polygraph retailers can detect, among other things, drug or alcohol problems which the background check may not indicate. As one can imagine, it is important to discover substance abuse problems before the individual is hired to work in a pharmacy or to operate a fork lift for a food distribution center. It is possible, for instance, that the company could be held liable should an employee have an accident while operating a fork lift when intoxicated.

A food chain operating in the western region estimated that it costs between $600 and $800 to process a new employee. This investment is worthwhile, for hiring honest and reliable employees not only helps control shrinkage but also ensures a lower employee turnover rate in the company. Another FMI retailer tells us that by using the polygraph, employee morale is improved because employees know they are working with carefully screened individuals. If losses do occur, the honest employee can be exonerated through the polygraph.

While we unequivocally oppose S. 1815 as presently drafted, we recognize that there is a need for balanced and effective legislation in this area. FMI supported the approach embodied in H.R. 3916, the Young-Darden alternative, which set minimum federal standards for administering the polygraph examination and minimum qualifications for examiners. Any alternative must protect the rights of the individual being tested. For example, individuals should retain the right to refuse to take a polygraph examination and polygraph results alone should not be grounds for refusing to hire an otherwise qualified applicant. In addition, an examiner must not be allowed to inquire about an individual's religion, sexual preferences, political views or feelings regarding labor unions.

FMI urges the committee to report legislation that seeks to eliminate the abuses that can occur during the administration of a polygraph examination rather that imposing a blanket ban on polygraph use by the private sector. We feel strongly that the admitted presence of abuses should not cause this important management tool to be discarded. Rather, the abuses should be corrected and the results carefully monitored. Please feel free to contact us if we can supply addition information.

Respectfully submitted,

Thomas W. Little

Thomas W. Little
Vice President,
Government Relations

HI-LINE ELECTRIC COMPANY

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DALLAS, TEXAS 75381-4844
PHONE: 214-247-6200

April 3, 1986

The Honorable Lloyd Bentsen
U. S. Senator
703 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Bentsen:

This letter is written in reference to the U.S. House of Representatives vote to ban the use of the polygraph by private employers who use the polygraph for pre-employment screening.

Please be advised that the polygraph test has proved to be a very necessary tool for screening potential employees of our company. For example, within the last three years the polygraph exam revealed the following about prospective employees who would have been hired, had it not been for the polygraph results:

- One person (sales position) was passed over for employment at Hi-Line, as he was a compulsive shoplifter.
- One person (sales position) stole approximately $1,000 worth of tools within a week of polygraph test from his previous employer.
- One person (credit clerk position) did not include previous jobs on his employment application.
- One person (sales secretary position) sold illegal drugs - 1 lb. of marijuana here and there.

I can truthfully say Hi-Line would have made some very bad hires without the use of the polygraph test, which would have had a negative effect on our profitability, i.e. profit sharing for our employees. Turnover and replacement costs are extremely expensive - up to $20,000 for a sales position.

The polygraph encourages people to be honest with you. They do not try to deceive you. I have included a list of the questions we ask on the polygraph test. Potential employees are presented with this list when given our employment application to fill out. No other questions are asked.

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TAPE • SCREWS • GROMMETS • BATTERY TERMINALS • IGNITION SETS • PIGTAILS

Page 2

We currently have ninety-four employees, all of which have been polygraphed. They passed with flying colors.

Hi-Line would like to stop the enactment of the ban on the polygraph test for private businesses. Employees who value their careers and jobs, who desire to avoid layoffs or pay cuts realize that the key is a healthy, quality group of fellow employees.

Sincerely,

Mike Sheaffer
President

/sd

cc: Hi-Line employees

**otel**
**mployees &**
**estaurant**
**mployees International**
**Union** AFL-CIO CLC

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EDWARD T. HANLEY
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General Secretary-Treasurer
VINCENT J. SIRABELLA
Director of Organization

ROBERT E. JULIANO
Legislative Representative

April 23, 1986

The Honorable Orrin T. Hatch
Chairman
Labor and Human Resources Committee
United States Senate
Washington DC 20510

Dear Mr. Chairman:

The Hotel Employees and Restaurant Employees International Union, which represents over 400,000 working men and women throughout the United States and Canada, strongly supports the legislation (S.1815) which you and Senator Kennedy have introduced. I congratulate you and your Committee for holding a hearing on the use and abuse of so-called "lie detector" tests in employment, and I thank you for the opportunity to add our union's views to the permanent record of this hearing.

It is difficult to understand why our government does not give employees and job applicants the protection from "lie detectors" routinely granted to indicted suspects in criminal proceedings. American courts restrict the use of "lie detector" test results as evidence in trials, and indicted criminal suspects cannot be forced to take the tests. How ironic that criminals cannot be convicted by a "lie detector," but workers can be denied jobs and branded as liars by these same devices.

The "lie detector" is allowed to act as both judge and jury in the workplace, without even giving workers the right to know why they "failed" the test and were denied employment. Workers cannot clear their names and records because they do not even know the nature of the accusations against them. Worst of all, an employee or job applicant may be denied employment again and again for "failing" one "lie detector" test because successive interviewers want to know whether a job applicant has ever "failed" a test.

The Congressional Office of Technology Assessment (O.T.A.) conducted a comprehensive evaluation of polygraph validity in November of 1983 and concluded that: "there is very little research or scientific evidence to establish polygraph test validity in screening situations, whether they be pre-employment, pre-clearance, periodic or aperiodic, random, or 'dragnet.'" O.T.A.'s review of field studies of polygraph validity showed polygraph test results vary widely and can often be less accurate in distinguishing honest people from liars than flipping a coin!

The sad consequence of basing employment decisions on inaccurate "lie detector" tests is that employers are refusing to hire able employees, putting honest citizens in the unemployment line, and hiring deceitful people and those who know how to beat the tests. In fact, it has been estimated that at least 200,000 Americans are denied jobs every year because employers rely on inaccurate "lie detector" tests to make personnel decisions.

Twenty-two states and the District of Columbia have enacted laws to restrict the use of "lie detector" tests in the workplace, and yet the number of employees and job applicants who must submit must submit to these tests continues to grow. These state statutes speak eloquently of the desire of state legislators to protect employees and those who seek employment from the indignities and dangers of "lie detectors." But these state prohibitions and restrictions are inherently inadequate. Employers evade state prohibitions by hiring in neighboring states with no restrictions, and then "transferring" employees into the state which has restrictions. Without a federal law to protect workers from the abuse of"lie detector" tests, employers who are intent on subjecting their employees and prospective employees to these tests will continue to find it is a simple and inexpensive proposition to evade the law merely by crossing state borders.

The legislation which you, Mr. Chairman, and Senator Kennedy have introduced to stop the abuse of "lie detectors" in employment will help to remove fear and intimidation from America's workplaces and restore dignity to honest American workers. Thank you for holding this hearing and giving me the opportunity to present our union's views.

Sincerely,

Edward T. Hanley
Edward T. Hanley
General President

Robert E. Juliano
Robert E. Juliano
Legislative Representative

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

# STATEMENT OF
# THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO
# TO THE
# SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
# REGARDING S.1815
# A BILL TO PROHIBIT THE USE OF LIE DETECTORS BY EMPLOYERS

APRIL 23, 1986

The International Brotherhood of Electrical Workers (I.B.E.W.) strongly supports S.1815 and the legislative concept that workers in private employment should be protected from intrusive and unnecessary intimidation and interrogation brought about through the use of lie detector tests. In equally strong terms, the IBEW, our members, and their families oppose the ill-conceived idea that an exemption to the proposed protections be granted to the Private Utility Industry.

In the House of Representatives, the IBEW supported H.R. 1524, which was similar to S.1815, until a last-minute maneuver on the House floor tacked on an amendment effectively exempting the Private Utility Industry.

Of our 900,000 I.B.E.W. members living and working in all 50 states, approximately 450,000 are either directly employed in the Electric Utility Industry or are employed by contractors working for an electric utility.

We, and many unbiased experts, do not believe any type of polygraph or lie detector is reliable to a degree which justifies mandatory submission to such tests and the high potential for misuse, error, and unjust persecution of loyal, hardworking workers. One example is the recent exposure of a former CIA employee who spied for the People's Republic of China for 30 years. While employed, the individual passed many lie detector tests. The history of this bogus technology is replete with instances where guilt was overlooked while innocence was prosecuted.

The electric utility industry has an extremely low labor turnover. It is not at all unusual for an employee to retire with 35, 40, or 45 years of service with one employer. It is interesting to note that utility employers generally take great pride in loyal, dedicated employees who often times serve in demanding, hazardous occupations requiring great skill and training.

We are sure of the reaction of a long-service employee, if he or she were requested to submit to a polygraph test. We believe Secretary of State George Shultz summed it up very well when he made the following remarks about the use of polygraphs, "The minute in this government I am told I am not trusted is the day I leave."

Most utility employees, our I.B.E.W. members, usually don't have the same economic advantage or option of picking up and leaving as Secretary Shultz. An electric utility lineman or powerhouse operator with 30 years service with one employer is much more restricted. As long as this employee stays with the utility, he or she will always feel they have the stigma of not being trusted.

According to the Congressional House Record, March 12, 1986, on Pages 1062 and 1063, Congressman Broomfield introduced the "Public Utility Exemption" to H.R. 1524.

The Honorable Mr. Broomfield stated: ". . .the electric utilities exercise great caution and care in selecting employees for these sensitive facilities, and the polygraph and similar methods serve as one of the tools they utilize in their checks."

The IBEW has recently conducted a survey of the IBEW Local Unions representing employees at 33 large investor-owned utilities in 15 states that do not prohibit the use of polygraphs. Of these 33 companies, 15 companies also have licensed nuclear power plants where the IBEW represents bargaining unit employees. Of the 33 companies we could only find five companies that use polygraph tests. Perhaps there are more involved that we did not uncover, but when you consider the fact that there are 218 Private Electric Utilities in the United States, the number using such unreliable tests has to be small.

The Congressional Record indicates one reason for the "Public Utilities Exemption" was to allow electric utilities the continued use of polygraphs to assure the security of certain segments of an electric utility. The survey the IBEW has conducted does not support this reasoning.

Security, operational integrity, and safety in vital utility systems, is indeed a matter of concern. However, this is nothing new. Historically, utilities have implemented exacting hiring and in-employment policies to assure dependable, trustworthy, and skilled employees. This is a normal function of good management and supervision with which we agree.

At present, 21 States and the District of Columbia have laws restricting the use of polygraph tests. As of December 31, 1985, these States and the District have 34 percent of the total electric generating capacity in the United States. They also have 38 percent of the installed Nuclear Generation in our Nation. The Utilities operating in these States, where polygraph tests are restricted, apparently are operating without any serious security problems by using normal security procedures. We ask, why can't other utilities operate in the same efficient manner without resorting to intrusive and unreliable polygraph tests?

In recent months there has been urgent concern about politically inspired terrorism. This is real and frightening; but any connection whatsoever between those problems and the heightened vigilance required to protect facilities would be unjustly and unfairly placed when employees of good record are threatened with oppressive measures.

As to security in nuclear power plants, the Nuclear Regulatory Commission requires an extensive background check and investigation of both utility and contractor employees before an employee is granted an unescorted access permit to the facility. The electric industry, as licensees of the plants, has gone to a great extent in the area of behavioral observation of employees permitted access to the plants and vital areas. We view this as a good sense approach to security and safety of employees and facilities.

The IBEW believes the lie detector has very little, if any, validity, as was pointed out in the 1983 study for the Congressional Office of Technology Assessment (OTA). The study, in part, stated: ". . .there is very little research or scientific evidence to establish polygraph-test validity in screening situations, whether they be pre-employment, pre-clearance, periodic, random or 'dragnet'." If polygraph technology is bad science for the vast majority of situations, it is bad science for the utility industry and all of the industry's workers.

In a 1977 doctoral dissertation, Frank Horwath, a Professor at Michigan State School of Criminal Justice and Director of the American Polygraph Association, found polygraphs only exonerated the innocent in 51 percent of the tests, or one percent more reliable than flipping a coin. We ask this Committee to imagine placing your livelihood, your good reputation, and your future on those odds.

If you are talking about a lie detector test as a tool to intimate, frighten, and cause workers a long-term resentment against his/her employer, then yes, the polygraph will perform to expectations in employment situations. However, the preponderance of evidence shows that lie detector tests place workers at unwarranted risk of loss of employment and personal reputation.

In conclusion, the IBEW believes good management and in-house security programs can far surpass any type of polygraph test. The submission of workers to lie detector testing is an outrageous violation of personal privacy, and such practices should be prohibited by federal law for all persons.

All employees, whether in the public or private sector, should realize that polygraphs are not a tool that will generate loyal and trustworthy employees. Just the opposite can be the result.

Finally, based on our knowledge of the Electric Utility Industry and what use is made of polygraph tests, the IBEW seriously questions why the Private Utility Industry has sought an exemption from Federal legislation banning lie detector tests. Since a large segment of the industry cannot, by State Law, use such tests and yet operates safely and securely, we strongly feel the Private Utility Industry exemption is unjust and unwarranted. Our dedicated and hard-working IBEW utility and construction membership, along with all other employees of the Nation's Utilities, deserve better treatment than that sought by the Industry.

The IBEW supports S.1815, as introduced, without amendments that would include any Public Utilities Exemption.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS
CHAUFFEURS • WAREHOUSEMEN & HELPERS
OF AMERICA
25 LOUISIANA AVENUE, N.W. • WASHINGTON, D.C. 20001

OFFICE OF
• JACKIE PRESSER •
GENERAL PRESIDENT

April 22, 1986

The Honorable Orrin G. Hatch, Chairman
Senate Committee on Labor and Human
Resources
428 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

On behalf of the nearly two million Teamsters members, I would like to take this opportunity to endorse and support S. 1815, the Polygraph Protection Act. Passage of this bill will prevent employees from using the results of polygraph tests to intimidate, harass or embarrass workers.

These machines cannot scientifically test an individual's honesty. The Congressional Office of Technology Assessment has stated that 50% of lie detector results are in error. Employers might as well flip a coin to determine whether an employee or job applicant is answering questions truthfully.

Despite this fact, many employees are required to submit to these unscientific tests. This is a direct infringement of a worker's right to privacy. In addition, unscrupulous employers use the results of polygraph tests to discriminate against minorities and to deny employees or prospective employees from advancement or new positions.

In our continuing effort to protect our membership's rights in the workplace, the International Brotherhood of Teamsters have negotiated "Anti-Lie Detector" clauses into hundreds of our contracts. For example, the National Master Freight Agreement and the United Parcel Service Agreement, which contain "Anti-Lie Detector" clauses, cover in excess of 300,000 workers. However, these protections do not cover so-called "voluntary" testing, nor do they cover all Teamster members.

The Honorable Orrin G. Hatch
April 22, 1986
Page 2

In conclusion, we believe that all workers should enjoy the basic protections provided by the Polygraph Protection Act. We strongly support this legislation, and urge you to oppose any attempt to weaken the bill, or exempt certain industries or employee groups from the coverage of this bill.

Sincerely yours,

Jackie Presser

Jackie Presser
General President

JP/dls

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LIE DETECTION
VIDEO DEPOSITIONS
INVESTIGATIONS
HYPNOSIS
LIE DETECTION TRAINING

May 5, 1986

Senator Orrin G. Hatch
Chairman
Committee on Labor & Human Resources
Washington, D.C. 20510

Dear Senator Hatch:

I am sending this correspondence as a substitute for my testimony before the Committee on Labor & Human Resources, in connection with the use of polygraph testing in the workplace.

Prior to your committee hearing this bill, I had written letters to all of the Louisiana Representatives, Senators, and to the President of the United States voicing my objections concerning this matter, and requesting their assistance in defeating such a measure. I was informed at that time by one of our Congressmen, Buddy Roemer, that I would be called to testify before the committee when this measure came up for a hearing.

I received your letter advising me that there would not be any opportunity for me to give oral testimony, due to a lack of time.

Mr. Hatch, I realize that we have never met, and under the circumstances all I really know about you is that you, in your position as a United States Senator, are attempting to pass a law that will put me out of business without giving me the opportunity to defend my position by refusing me the opportunity to appear and at least be heard. Members of your committee should be allowed to see that there are many people in the lie detection field that are intelligent, professional, and ethical.

To my knowledge all testimony presented at the hearing was focused on the polygraph instrument. From my many phone calls to Washington talking to individuals, such as Mr. Kevin McGinness, and Diann Howland, Senator Quail's aide, there was no mention that the instrument known as the Psychological Stress Evaluator was fairly evaluated, nor was there any evidence presented to say that this instrument was an inaccurate piece of equipment. The only instrument that I use in my business is the Psychological Stress Evaluator.

As a professional law enforcement man and security professional with 30 years experience, a graduate of Loyola University, and instructor in the Criminology program at Loyola University, and having completed two years of graduate work at the Law School at Loyola University, I have found that the most accurate instrument used in the lie detection field is the Psychological Stress Evaluator, but therein lies a matter of opinion. I am sure that the American Polygraph Association would say that the Psychological Stress Evaluator is not as accurate as the Polygraph. The argument could very easily resemble two businessmen arguing over whether a Lincoln Town Car is better than a Fleetwood Cadillac. It is a matter of preference.

Aside from all of that, the law as it is proposed will be discriminatory in that it allows law enforcement, whether it be on a federal, state, or local level to continue the use of lie detection instruments as they may choose.

I also understand that there have been some amendments to the law that would also allow nursing home, day care centers, nuclear power plants, and some other areas of private industry that have significant security risks to continue using lie detection services. If this is so, it would appear that there is a confusion in the rationale pertaining to this legislation, in that all of the proponents of the bill to outlaw lie detection in private industry claim that lie detection is not reliable and should not be used. Yet your law will allow it to be used in selected high risk or sensitive areas in the public and private sector. It is absolutely inconsistent to tacitly recognize the efficacy of lie detector instruments for some industries and to deny its reliability for others.

I seriously contend that the answer to the problem of abuses in the field of lie detection, or the inaccuracies in the field of lie detection should be corrected through education and regulation, and not abolition.

In the State of Louisiana for many years there were no laws requiring any type of training. There were no regulatory committees to oversee the use of lie detection instruments, and here in Louisiana we too faced legislation to abolish such practices. We decided to regulate the industry similar to the legal profession and the medical profession. We knew that if laws were passed to demand the proper training, to demand that proper ethics be adherred to, to demand professionalism, to provide continuing education for licensed examiners, there would result in a tremendous improvement in the quality of the services and the individuals that are administering lie detection tests in the State of Louisiana.

I had personally drafted the PSE legislation for this State and submitted it to Senator Elwin Nicholson to be introduced for the Psychological Stress Evaluation field ("voice lie detectors"). That piece of legislation when proposed passed with absolutely no opposition. The bill was designed to regulate the practitioners and enforce any violations of the law in that particular field. Since that time, there has been a marked improvement in the quality of the services and the examiners in this state.

Subsequent to that, the polygraph association had a law amended that would require that they be licensed in the State of Louisiana also, which brought about an upgrading of the entire lie detection profession in this state.

At the present time there are four states that have laws to license and regulate examiners, and again, I would like to reiterate that the answer to abuses in a particular profession is regulation and not abolition. If it is our desire to abolish things that are abusive to our citizens, and abusive to our society, then Senator, I would suggest that your next bill should be to eliminate smoking in this country, since smoking is one of the largest killers of individuals in the United States. I SEE NO LAWS TO ABOLISH CIGARETTE SMOKING IN THIS COUNTRY! Is the tobacco industry too big to tackle? In fact, the only regulations that have been passed were to include the warning on the side of the cigarette packages informing the smokers that cigarettes do cause cancer.

Let's get to another big killer, the automobile industry. More individuals have been killed by automobiles in this country than in any of the wars that we have participated in. I see no laws to abolish the vehicle. In fact, it would be ridiculous to abolish the vehicle, but there have been laws to regulate, and laws to say that a person must be licensed. Laws that say that speeds must be reduced to reduce the NUMBER of people killed.

We look at other professions, such as the medical profession, who today because of their inadequacies and incompetencies have had to bear the brunt of escalating insurance costs to the point that doctors can barely afford the premiums anymore. Now all of these high premiums for medical malpractice insurance that doctors are paying today result from serious mistakes that doctors have made, sometimes serious enough to result in the death of an individual. I have not yet seen any new laws, especially to abolish medical practice, nor to further regulate the medical practice. Probably the only individuals that have taken any type of punitive action against the medical practice have been the insurance companies in their increasing premiums.

The legal profession, of course, through the bar association and their regulatory commission, which in many cases is a farce, is not exempt, as it is rare that you find one Attorney suing another Attorney. I have yet to see strong legislation preventing attorneys from initiating and pursuing frivolous lawsuits.

In the above mentioned industries or professions, there exist situations that cost people their lives, their health, and their financial well being every single day. I don't believe that there are many instances where truly honest and responsible employees have suffered injury from decisions of truly sensitive and responsible employers and professional lie detection examiners.

What about the businessman? Typically, he can no longer obtain a correct reference, because the previous employer will give a dishonest employee, who has been terminated, a good recommendation mainly to relieve himself of the umemployment benefit obligation. Neither a police check, nor a credit chreck can be obtained on job applicants, because of invasion of privacy laws.

What's left? Does the businessman, who has invested his money and time into building a successful business operate at the mercy of dishonest employees. Where are the laws to protect this individual???

If you take the lie detector tool out of the hand of a few irresponsible employers and/or unprofessional examiners through legislation, do you truly believe that you will have eliminated irresponsible employers, who unfairly or improperly evaluate their employees, or who unnecessarily invade the privacy of those employees?

What you will most certainly accomplish is to take an effective instrument out of the hands of responsible employers, who utilize it to protect the broader civil and economic rights of their employees, and ultimately, the American consumer.

Senator, I would venture to say that in all your knowledge and experience, you have never had personal experience with the use of either a Polygraph, a Psychological Stress Evaluator, the Mark II, the Mark IV, the Mark IX. Any legislation that you are proposing upon this particular issue would be heresay or requests from special interest groups, that have a particular ax to grind against this profession.

Please examine the statistics that show that over fifty percent of the businesses in this country that go bankrupt every year do so largely due to INTERNAL THEFT, not external theft. Please understand that because of all of this internal theft that continues in private industry throughout this country and throughout this world, that you and I as consumers have to bare the brunt of this cost when we step up to that cash register. I ask you please to bear this seriously in mind before you allow a monster to be created through your legislation, that may one day consume the consumer.

In all fairness Senator Hatch, I ask the opportunity to meet with you, to discuss this issue, to at least give you a broader scope of knowledge before you spearhead the passage of a law that could put many, many people out of business. People that have dedicated their lives to professionalism, that have a serious monetary investment, that have been ethical, and have provided a truly professional and worthwhile service to the business community.

Respectfully yours,

Ronald J Lauland

Ronald J. Lauland
Certified Stress Analyst
Certified Dektor Instructor
Criminologist
Registered Hypnotherapist
Owner/Lauland Security

RJL/ms

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TELEPHONE
501-376-2269
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April 15, 1986

Hon. Orrin G. Hatch
Attn: Kevin McGuiness
424 Dirksen Building
Washington, D.C. 20510

Re: S. B. 1815

Dear Senator Hatch:

I have noted that you are a sponsor of S. B. 1815 which will ban the use of polygraph examinations in employment.

As an attorney representing clients who have been subjected to polygraph examinations in employment, I should like to tell you of a couple of examples in this area in Arkansas, a state which licenses polygraph examiners. I should like for this letter to be entered into the record of the proceedings on this bill.

In one case, I represented a labor union taking a grievance to arbitration that involved a long-term employee who was accused of theft. This man was a head checker in a retail grocery store, where the cash accounts had showed up short for a long period of time. Basically, the store could not conduct a competent investigation and instead sent three or four checkers to a polygraph examiner. When the polygraph results showed that the grievant had been "deceptive," he was summarily fired. The labor arbitrator, like most, refused to consider the polygraph "evidence" and, since there was no other evidence of the mans guilt, the grievance was sustained and he was reinstated with full back pay. At the arbitration hearing, the company attempted to introduce the polygraph results by putting the polygrapher himself on the stand. In what is a very typical pattern, the polygrapher proved to be a retired police employee, and my cross-examination of him proved that he knew very little about the supposed "science" of polygraphy and could no more tell you who was telling the truth than a Ouija board.

In another case, I am presently handling, a young man with multiple sclerosis who had worked since his teenage years at a building supply company, was forced to take a polygraph test in order to satisfy the owners curiosity about a particular incident where, although there was no evidence of any theft, the owner was never the less suspicious. Naturally, an employee in this sort of situation is asked to sign a "consent" form, it being understood that if he does not "consent" to the polygraph test then he will no longer have a job. In this guise, the polygraphers claim that they only test voluntary subjects. When the young man told the polygrapher that he had multiple sclerosis and was in fact taking a drug for that condition, called prednisone, the polygrapher treated the mans offer of information as some sort of a device to get out of the test, and ignored the information. Not surprisingly, the polygrapher reported to the employer that the young man had been deceptive in his answers to the questions. I can suggest to you that, even if one were inclined to believe in the technique of polygraphy (which no scientific evidence sustains, as I am sure you are aware), a person whose nervous system is afflicted with multiple sclerosis and who is on the drug prednisone does not present a bona fide candidate for any such examination. The young man later was discharged from his employment, and with his multiple sclerosis condition, cannot find another job. This young man will maintain a lawsuit against both his employer and the polygrapher.

These are just a couple of examples of the type of use to which polygraphy is put in the employment sphere here in Arkansas. I very much appreciate this opportunity to make these comments to you, and I very much appreciate your sponsorship of S. B. 1815.

Thank you for your consideration.

Very truly yours,

J L Burnett

John L. Burnett

JLB/ce

STATEMENT OF WILLIAM H. GOUGHTON, JR., PRESIDENT, LEHMAN ELECTRIC & PLUMBING, INC.

Mr. Chairman, Members of the Committee,

My name is William H. Houghton, Jr. I am President of Lehman Electric and Plumbing, Inc., a 47-year-old family business which trades under the name, Lehman Electronic Wizards.

I also serve as Treasurer of the National Association of Retail Dealers of America (NARDA), a trade association of appliance and hard goods retailers which represents nearly 5,000 companies like mine all across the country.

NARDA and its members, on whose behalf this statement is submitted, feel most strongly that pending legislation, which would prohibit the use of the polygraph by retailers like ourselves, is not, in our best interests and certainly not in the best interests of our customers. We strongly urge that this committee reject both S. 1815 and H.R. 1524, which was passed earlier this year by the House of Representatives.

To help you understand why we oppose this restrictive legislation, let me explain my use of the polygraph. Our business was founded in 1939; in that first year, sales totalled approximately $200,000.

Now, as we near our 50th anniversary in business, our sales exceed $7.2 million. We currently employ 34 people and operate two stores, one in Fort Wayne, Indiana, and one in our headquarters city of Huntington, Indiana, which is located some 25 miles from Fort Wayne in the northeast corner of the state.

We sell a broad array of merchandise: appliances such as refrigerators and dishwashers, television sets, video cassette records and home and car stereo equipment. We also rent much of the same merchandise to those customers who do not wish to purchase.

When I assumed control of this family business some five years ago, our inventory "shrinkage" -- that is, merchandise which we knew we had purchased but could not account for by physical counting -- approached $20,000. Today, I am pleased to report that our most recent physical inventory, taken in January, 1986, showed that we had all of the merchandise that we had paid for. In short, we had no unaccounted-for shortages.

I believe that this dramatic turnaround is due to our company policy of vigorously prosecuting all cases of theft, whether by employees or outsiders. A vital part of our aggressive prosecution policy is the use of the polygraph. Before I tell you about specific instances in which this use has paid off, let me first tell you that, when we decided to utilize the polygraph some five years ago, we went to our employees and told them of our decision. We indicated that we did not want to invade anyone's privacy and we asked each employee to sign a statement giving us permission to administer a polygraph test when we suspected a shortage problem. One employee objected to signing such a statement and, for that reason, we chose not to accept any such statement from any then-current employee. However, we decided to require, as a condition of employment for persons hired after that date, that applicants agree to take a polygraph test in cases of suspected merchandise theft.

In the interveing five years, we have used the polygraph four times. Each time it has led to a successful criminal prosecution by local authorities; more importantly, it has led to the return of stolen merchandise.

The first case involved a salesman who was caught by a store manager stealing money from a cash register. The salesman had destroyed the store copy of customer sales slips in an effort to cover up the theft. A polygraph test was administered, and we learned that the salesman had previously stolen more than $6,000 in cash and merchandise; all of this was recovered and the salesman was successfully prosecuted.

The second case involved a delivery person, who was discovered via audit to be cheating on the use of his company-provided gasoline credit card. The polygraph test uncovered the fact that he had also been engaged in theft of merchandise. This information was turned over to the local police and he was successfully prosecuted.

The third case involved a juvenile warehouseman, who was caught by a store manager in the act of stealing a car stereo. We administered a polygraph test and the examiner reported that the young man had lied in his answers. The young man protested his innocence, and, for that reason, he agreed to take a second polygraph examination in the presence of his parents, who also consented to the procedure. When the young man failed this second polygraph test, he confessed to stealing some $2,000 in additional merchandise, all of which was returned to the store. Because he was a minor, the case was not prosecuted.

The fourth case involved a clerk who was caught stealing merchandise. The polygraph test disclosed that he had taken even more merchandise and, in addition, had engaged in the unauthorized copying of copyrighted taped music. The information was turned over to the local police. We believe that this is the only case in which a person has been sentenced to jail for tape pirating, one of the most serious problems besetting our industry today.

All of these polygraph tests are administered by a reputable firm in Fort Wayne. In fact, the firm is the same one used by local law enforcement authorities when they wish to give a polygraph test. The examiners are most professional, and they never ask questions of a personal nature, except as necessary to verify so-called "baseline" information such as name and address. All of the questions are directly related to the theft under investigation.

Without the polygraph, I do not believe that we could have successfully carried out our strong policy of theft prosecution. Responsible use of the polygraph is crucial to this policy.

In every case in which the device has been used, there has not only been a successful criminal prosecution, but, in total, we have recovered nearly $10,000 in merchandise and cash that we did not know had been stolen. That $10,000 becomes "bottom line" profit, money on which we pay taxes and which does not have to be passed along to our customers in the form of higher prices to cover merchandise shortages.

As I told you earlier, we have used the polygraph to dramatically cut our merchandise and cash losses. We believe that this is an important result which we have been able to achieve through judicious use of the polygraph, use which is carefully monitored to insure that the device will not be used indiscriminately. We do not administer polygraph tests to prospective employees and we do not use it in a blanket manner, but we will administer the examination to anyone suspected of or caught in the act of merchandise or cash theft.

For the reasons I have outlined, our company and NARDA's other independent small business members feel strongly that the legislation pending before this committee is unwarranted and ill-advised. I think that the exemptions adopted by the House in passing its bill prove our point. We submit that it's not for Congress to dictate that the polygraph can be used to ascertain drug theft, but can't be used by a retailer like myself to ascertain theft or cash or merchandise. Those decisions are best left to the individual retailer who wishes to pursue shortage problems in his own way.

In conclusion, NARDA and its nearly 5,000 member companies strongly urge this Committee not to ban polygraph use, and to reject both pending bills. We would of course stand ready to work with the Committee and its staff to draft responsible legislation, should you desire to pursue that approach.

DAVID F. LINOWES
BOESCHENSTEIN PROFESSOR OF POLITICAL ECONOMY AND PUBLIC POLICY
UNIVERSITY OF ILLINOIS

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May 5, 1986

Senator Orrin G. Hatch
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

Thank you for your letter of April 11, 1986 inviting me to submit a statement on polygraph testing in the workplace in connection with the hearing held by the Committee on Labor and Human Resources. As former Chairman of the United States Privacy Protection Commission, I am pleased to respond to your request.

During the course of the deliberations of this Commission, one of the areas we covered was polygraph testing for employment purposes. Representations made by creditable witnesses indicated that accuracy ranged from 65% to 90%. Such a rate of accuracy is tolerable for use in a criminal investigation when used by skilled law enforcement investigators to be balanced with other evidence. For employment purposes, however, it was our judgment that polygraph use should be prohibited on the grounds of inadequate accuracy and the fact that it is unreasonably intrusive.

In trying to establish why the polygraph had such a low accuracy rate in employment testing, a study several years ago found that it resulted from the absence of a proper psychological atmosphere in the employment-testing environment, and the fact that time allotted by the professional testing organization to the test process usually was too limited.

From the Commission's findings, we concluded that the main objections to the use of the polygraph in the employment context are that it deprives individuals of any control over divulging information about themselves, and that it is unreliable. Although the latter is the focal point of much of the current debate, it is the former that was the paramount concern of the Commission.

Senator Orrin G. Hatch
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

May 5, 1986

In some circumstances, depriving "individuals of any control over divulging information about themselves" where national security is at stake is precisely what has to be sought. This is true in a specific criminal investigation or in an investigation of suspects involving security leaks. But to apply it across the board, or even to random samples of personnel is stretching it to objectionable dimensions. Such use does have an inherent chilling effect on employees, and may raise the issue to Constitutional proportions. Incidentally, in a research survey conducted several years ago at the University of Illinois, we found that 99% of the largest industrial companies do not use polygraphs or other truth verification equipment to verify information about personnel.

Polygraphs in general can be used with good results in investigations of illegal acts. Where suspected breakdowns occur, the use of polygraphs with the few likely people involved as one aspect of an investigation by well-qualified polygraph professionals (of which the number is quite limited) could be effective. But, broad-scale use of polygraph testing for general employment purposes could be considered an unfair employment practice.

Sincerely,

David F. Linowes

# Personal Privacy in an Information Society

The Report of
The Privacy Protection Study Commission

July 1977

## PRIVACY PROTECTION STUDY COMMISSION

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Boeschenstein Professor of Political Economy
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Philadelphia, Pennsylvania

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Washington, D. C.

Congressman Edward I. Koch of New York
Washington, D. C.

State Senator Robert J. Tennessen, Attorney
Grose, Von Holtum, Von Holtum, Sieben & Schmidt
Minneapolis, Minnesota

~~**ing disclosures made without the employee's authorization in response to specific inquiries or requests to verify information about him; and**~~

~~(h) **providing for regular review of compliance with articulated fair information practice policies.**~~

## ~~SPECIFIC RECOMMENDATIONS~~

~~With a few important exceptions, the Commission's specific recommendations on record keeping in the employee-employer relationship also embody a voluntary scheme for resolving questions of fairness in the collection, use, and dissemination of employee records. The reasons for not recommending statutory implementation of many of these recommendations should by now be clear. The Commission does, however, believe that employees, like other categories of individuals, should have certain prerogatives with respect to the records that are kept about them, and the recommendations below, if adopted, would serve to define those prerogatives as a matter of practice.~~

### ~~*Intrusiveness*~~

~~Some of the information an employer uses in making hiring and placement decisions is acquired from sources other than the individual applicant or employee. In addition to former employers and references named by the individual, such third party sources may include physicians, creditors, teachers, neighbors, and law enforcement authorities.~~

~~One way to keep an employer's inquiries within reasonable bounds is to limit the outside sources it may contact without the individual's knowledge or authorization, as well as what the employer may seek from the individual himself. To do so, however, is to grapple with long and widely held societal views regarding the propriety of inquiries into an individual applicant or employee's background, medical history, credit worthiness, and reputation. As the Commission has agreed elsewhere in this report, the intrusions on personal privacy that seem to be taken for granted in many of the record-keeping relationships the Commission has studied usually begin with the criteria we, as a society, accept as proper ones for making decisions about people. Thus, while the Commission was struck by the extensiveness of the inquiries some employers make into matters such as medical history, it concluded that so long as society considers the line of inquiry legitimate, judgments about how extensive it should be must be largely aesthetic.~~

~~The same was not true, however, with regard to some of the *techniques* that are used to collect information about applicants and employees. There the Commission found a few it considers so intolerably intrusive as to justify banning them, irrespective of the relevance of the information they generate.~~

### TRUTH VERIFICATION DEVICES

The polygraph examination, often called the lie-detector test, is one technique the Commission believes should be proscribed on intrusiveness grounds. The polygraph is used by employers to assess the honesty of job applicants and to gather evidence about employees suspected of illegal activity on the job. An estimated 300,000 individuals submitted to this procedure in 1974.[29]

The main objections to the use of the polygraph in the employment context are: (1) that it deprives individuals of any control over divulging information about themselves; and (2) that it is unreliable. Although the latter is the focal point of much of the continuing debate about polygraph testing, the former is the paramount concern from a privacy protection viewpoint. During the 93rd Congress, the Senate Subcommittee on Constitutional Rights concluded that polygraph testing in the context of *Federal* employment raises intrusiveness issues of Constitutional proportions.[30] Similarly, the Committee on Government Operations of the House of Representatives emphasized the "inherent chilling effect upon individuals subjected to such examinations," and recommended that they no longer be used by Federal agencies for any purpose.[31]

Advocates of banning the polygraph in employment describe it as humiliating and inherently coercive and suspect that some employers who use it do so more to frighten employees than to collect information from them.[32] Use of the polygraph has often been the subject of collective-bargaining negotiations and has even inspired employees to strike. The Retail Clerks Association, with more than 700,000 members, urges its locals to include anti-polygraph provisions in all contracts.[33]

Other truth-verification devices now on the market, such as the Psychological Stress Evaluator (PSE), pose an even greater challenge to the notion that an individual should not be arbitrarily deprived of control over the divulgence of information about himself. Like the polygraph, the PSE electronically evaluates responses by measuring stress. Unlike the polygraph, the PSE uses voice inflections to measure stress and thus may be used without the individual knowing it is being used.[34] The use of such devices in the employment context, and the practices associated with their use, are, in the Commission's view, unreasonable invasions of personal privacy that should be summarily proscribed. The Commission, in effect, agrees with the conclusions of the two Congressional committees that have examined this issue as it arises in the Federal government and, therefore, recommends:

*Recommendation (3):*

**That Federal law be enacted or amended to forbid an employer from**

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[29] *Privacy, Polygraph, and Employment*, Report of the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate, 93d Congress, 2d Session, November 1974, p. 3.

[30] *Ibid.*, pp. 9-14.

[31] *Op. cit.*, House Committee on Government Operations, p. 46.

[32] *Ibid.*, p. 38.

[33] Testimony of the Retail Clerks International Association, Employment Records Hearings, December 17, 1976, p. 1009.

[34] Joseph F. Kubis, "Comparison of Voice Analysis and Polygraph as Lie Detection Procedures," (Report for U.S. Army Land Warfare Laboratory, August 1973) p. 6.

**using the polygraph or other truth-verification equipment to gather information from an applicant or employee.**

The Commission further recommends that the Congress implement this recommendation by a statute which bans the manufacture and sale of these truth-verification devices and prohibits their use by employers engaged in interstate commerce. A clear, strong, Federal statute would preempt existing State laws with less stringent requirements and make it impossible for employers to subvert the spirit of the law by sending applicants and employees across State lines for polygraph examinations.

## PRETEXT INTERVIEWS

The Commission also finds unreasonably intrusive the practices of investigators who misrepresent who they are, on whose behalf they are making an inquiry, or the purpose of the inquiry. (These so-called "pretext interviews" are discussed in some detail in Chapter 8.)

Because background checks in connection with the selection of an applicant or the promotion or reassignment of an employee are not criminal investigations, they do not justify undercover techniques. Nor, according to testimony before the Commission, are pretext interviews necessary to conduct adequate investigations in the employment context. Witnesses from private investigative firms repeatedly said that extensive information about an applicant can be developed without resorting to such ruses.[35] Accordingly, in keeping with the posture it took on pretext interviews in connection with insurance underwriting and claims investigations, the Commission recommends:

### *Recommendation (4):*

**That the Federal Fair Credit Reporting Act be amended to provide that no employer or investigative firm conducting an investigation for an employer for the purpose of collecting information to assist the employer in making a decision to hire, promote, or reassign an individual may attempt to obtain information about the individual through pretext interviews or other false or misleading representations that seek to conceal the actual purpose(s) of the inquiry or investigation, or the identity or representative capacity of the employer or investigator.**

Amending the Fair Credit Reporting Act in this way would be a reasonable extension of the Act's goal of assuring that subjects of investigations are treated fairly.

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[35] *See*, for example, Testimony of Pinkerton's Incorporated, *Private Investigative Firms*, Hearings before the Privacy Protection Study Commission, January 26, 1977, p. 156 (hereinafter cited as "Private Investigative Hearings"); and Testimony of Wackenhut Corporation, Private Investigative Hearings, January 26, 1977, pp. 53-54.

## ~~REASONABLE CARE IN THE USE OF SUPPORT ORGANIZATIONS~~

~~An employer should not be totally unaccountable for the activities of others who perform services for it. The Commission believes that an employer should have an affirmative obligation to check into the *modus operandi* of any investigative firm it uses or proposes to use, and that if an employer does not use reasonable care in selecting or using such an organization, it should not be wholly absolved of responsibility for the organization's actions. Currently, the responsibility of an employer for the acts of an investigative firm whose services it engages depends upon the degree of control the employer exercises over the firm. Most investigative reporting agencies are independent contractors who traditionally reserve the authority to determine and assure compliance with the terms of their contract. Thus, under the laws of agency, an employer may be absolved of any liability for the illegal acts of an investigative firm if those acts are not required by the terms of the contract.[36] Accordingly, to establish the responsibility of an employer which uses others to gather information about applicants or employees for its own use, the Commission recommends:~~

### ~~*Recommendation (5)*~~

~~**That the Federal Fair Credit Reporting Act be amended to provide that each employer and agent of an employer must exercise reasonable care in the selection and use of investigative organizations, so as to assure that the collection, maintenance, use, and disclosure practices of such organizations comply with the Commission's recommendations.**~~

~~If *Recommendation (5)* were adopted, and it could be shown that an employer had hired or used an investigative firm with knowledge, either actual or constructive, that the organization was engaging in improper collection practices, such as pretext interviews, an individual or the Federal Trade Commission could initiate action against both the employer and the investigative firm and hold them jointly liable for the investigative firm's actions.~~

### ~~*Fairness*~~

~~Unfair practices can enter into employment record keeping in four main ways: (1) in the kinds of information collected for use in making decisions about individuals; (2) in the procedures used to gather such information; (3) in the procedures used to keep records about individuals accurate, timely, and complete; and (4) in the sharing of information across~~

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[36] ~~*See*, e.g., *Milton v. Missouri Pacific Ry. Co.*, 193 Mo. 46, 91 S.W. 949 (1906); *Inscoe v. Globe Jewelry Co.*, 200 N.C. 580, 157 S.E. 794 (1931). However, recent decisions in a few jurisdictions indicate that under certain circumstances, one who employs a private investigator may not thereby insulate himself from liability for torts committed by the investigator by merely arguing that they were committed outside the scope of the employment. *Ellenberg v. Pinkerton's, Inc.*, 125 Ga. App. 648, 188 S.E.2d 911 (1972); *Noble v. Sears, Roebuck and Co.*, 33 Cal. App. 3d 654, 109 Cal. Rptr. 269, 73 A.L.R. 3d 1164 (1973).~~

**MICHAEL G. LLOYD**
**15757 Meridian Avenue North**
**Seattle, Washington 98133**

April 14, 1986

Senator Orrin Hatch
Attn: Kevin McGinnis
424 Dirksen Building
Washington, D.C. 20510

Dear Senator Hatch:

I would like to take this opportunity to express my support for your co-sponsorship of S.-1815 to curb the use of polygraphs. This issue is of personal concern to me as I was a victim of unlawful employment discrimination based solely upon my refusal to subnit to polygraph testing.

In 1982, I was illegally forced to resign from my position of five years after I exercised my legal right to decline a mass lie detector test that was being administered to investigate an alleged theft of twenty dollars from an unlocked filing cabinet. I can still recall the feelings of anger, hurt and helplessness engendered by the capricious manner in which my former employer ignored five years of excellent service and instead relied upon the dubious validity of an unproven low-tech method of assessing honor and integrity, intangible qualities that cannot be measured by meters and recorded upon graph paper.

My case is not unique. The abuse of polygraphs by largely unqualified operators occurs more and more frequently across the country. I urge you to take decisive action through the venue of the United States Congress to address this problem.

Please do not hesitate to contact me if I can assist you in any way in regards to this manner. I request that this letter be made part of the record in the legislative hearing scheduled for April 23 rd.

Very truly yours,

Michael G. Lloyd

Michael G. Lloyd

April 21, 1986

To: Senate Committee on Labor
and Human Resources

From: Charles Humble, President,
Indiana Polygraph & Stress Analysts Assn.

I am opposed to S.B. 1815 for a number of very valid reasons but the most obvious is that it validates the instrumentation by allowing its use in the public sector while denying its use in the private sector on the grounds that "lie detection" doesn't work. This bill does not attempt to place valid regulations on the use of lie detection, it will eliminate its use (in the private sector).

There is no question that certain regulations should govern the use of lie detection and several bills have been introduced that would accomplish this end. These bills would protect innocent persons while retaining an essential tool for industry.

As an examiner, I conduct several exams a week for defense attorneys on persons charged with crimes. In about 80% of those exams, the subject fails the exam and then confesses to the charge. This information is then given to the attorney who usually contacts the prosecutor and arranges a plea bargain agreement. Without this information, the defense attorney would normally plead his client innocent and go to trial. By our best estimates, we have saved the citizens of this county around $400,000.00 within the last year in trial costs. Should you pass this bill, I will no longer be able to offer my services and a valuable tool in the criminal justice system will be lost.

On Friday of last week I had a young lady in for an exam from a local oil company. She had been robbed the previous day of $147.00. The attendent was supposed to have only $100.00 on her at any one time. The normal proceedure is to terminate the individual for a violation of company policy. However, the company offered to conduct an exam and to pay for the exam concerning the robbery. The exam showed that the attendent was actually robbed and that she did not take any of the money. If you pass S.B. 1815, the only alternitive that the company would have is to terminate the attendent.

On the same day, I conducted four exams for another oil company concerning the disappearance of $2,000.00. The company narrowed the list of persons that had access to the money down to the four persons that I was to test. The third person that I tested failed the exam and then confessed to the theft. The only alternitive that the company would have available to them should you pass this bill, would be to terminate all four indivduals. In this instance, three jobs were saved and the money was recovered. Why should companies be forced to do this type of termination simply because one of the best investigative tools has been taken away from them?

Lie detection, if conducted by a proficient examiner, is very accurate and very useful in the private sector as well as the public sector. The key phrase here is proficient. You will find no argument when reasonable regulations are proposed, we favor reasonable regulation. This bill does not regulate, it bans. Where will those exempted from this act find an examiner to conduct the exams? If this bill is passed, all private examiners will go out of business.

I am in the business of screening people into jobs, not out of them. I am in the business of saving innocent persons jobs, not getting them fired. I am in the business of assisting attorneys in properly defending their clients.

In closing, I would say to you that the passage of this bill will cause havoc in the business community that is already struggling against what is now a huge drain on them in the form of employee theft. The passage of this bill will rob the criminal justice system of a valuable tool but not for the police, but rather for the defense.

This bill is bad for innocent workers, bad for business, bad for the criminal justice system, and bad for society in general and I urge you to defeat it.

Thank You.

MARINE MIDLAND BANK, N. A.
140 BROADWAY
NEW YORK, N. Y. 10015

PHILIP T. SMITH
Director
Government Affairs

April 22, 1986

The Honorable Orrin G. Hatch
Chairman
Senate Committee on Labor and
Human Resources
428 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

The Marine Midland Bank, N.A., as a member, fully supports the New York Clearing House joint comment submitted to your Committee regarding S. 1815. We agree with that document's reasoning and with its request for exemption of federally regulated financial institutions from the operation of the Polygraph Protection Act of 1985.

A specific consideration, however, requires us to add an additional observation. Marine is a consumer driven institution with nearly 300 branches throughout New York State. Fifty percent of the bank's deposit base comes from small businesses and individual depositors. It is our view that Marine Midland has a special and protective relationship to those depositors whether they are checking, savings, retirement accounts, trust accounts or a combination of any other services. That special relationship transcends all other considerations.

It is a truism that any institution's best protection derives from the character of its employees. In the exceptional case, Marine and the Clearing House seek only to preserve a realistic deterrent whose use and effect on individuals, in our case certainly, is rigorously controlled by an internal, due process policy.

We would appreciate the inclusion of this correspondence in the hearing record regarding S. 1815.

Thank you for your attention in this regard.

Very truly yours,

jr

**MOTOROLA INC.**

April 23, 1986

The Honorable Orrin G. Hatch
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

It is our understanding that the Labor and Human Resources Committee will be holding a hearing today on S. 1815 to prohibit any employer from using any lie detector test or examination in the work place, either for pre-employment testing or testing in the course of employment. As a major electronics company with 58,000 U.S. employees, we would like to submit this letter for the record.

Motorola recognizes the need to establish and enforce standards for polygraph examiners. We encourage and support the establishment of standards as part of this pending legislation. It is our company's desire to retain the option of using polygraph as an investigative technique for selected cases involving current employees.

We, therefore, urge that S.1815 be modified to allow the selective use of polygraph examinations with administration standards that would assure validity and quality.

Sincerely,

Travis Marshall
Senior Vice President
Director, Government Relations

Government Relations 1776 K Street N.W., Suite 200 Washington, D.C. 20006 (202) 862-1500

## Statement of the Multi-Housing Laundry Association on S. 1815

The Multi-Housing Laundry Association (MLA) appreciates the opportunity to testify for the record on S. 1815, a bill concerning the use of polygraphs by businesses in interstate commerce. We strongly oppose this bill, which would place unreasonable restrictions on our members' ability to protect themselves from employee theft -- a problem to which our industry is particularly vulnerable.

To provide the proper context for our comments, we provide a brief description of our industry. The multi-housing laundry industry operates laundry facilities in all types of multi-family residences. The industry's members, known as "route operators," purchase and install laundry room equipment, collect the coins paid into the machines, and service the machines. In exchange for the right to operate the laundry room, they provide the owner of the housing with a substantial portion of the gross income received.

Virtually all of the route operators' income consists of the coins placed in laundry machines located in buildings that are frequently scattered over a large area. The coins must be collected, brought to the route operator's office, counted, separated into units of appropriate size, and taken to a bank for processing and deposit. At every step, particularly the first two, route operators are extremely vulnerable to theft. They are even more vulnerable than other businesses that deal in cash, such as retailers, because collection takes place at far-flung, unsupervised sites where it is virtually impossible to monitor the actions of the collecting employee.

Our members must use effective methods of controlling employee theft. The very survival of their businesses depends on this. Also, their contracts with the housing owners require that the owners receive a certain percentage of the income collected, and our members need to assure these owners that their share is not being unreasonably reduced due to theft. Finally, route operators need to assure the IRS that they are paying tax on their actual income -- not an income figure that is drastically reduced by employee theft.

In order to deal with these complex problems, many of our members use polygraph tests as one way of controlling theft. Tests are most frequently used as a tool to screen job applicants, and some route operators also use polygraph tests as a periodic check on their employees. As a pre-screening tool, the tests are used almost exclusively to test prospective employees for problems relating to theft -- a history of theft from prior employers or of shoplifting, for example. Some operators also use the tests to check for other problems that could significantly affect job performance -- a history of drug or alcohol abuse, for example. Finally, some route operators use polygraph tests to check the accuracy of responses on the written application.

We would like to make several points about our members' use of polygraph tests. First, particularly in the pre-screening context, they are only one tool of several that route operators use to evaluate the reliability of employees and prospective employees. Most operators use detailed written applications, which include employment history and references. They also interview the applicant extensively without use of the polygraph. In other words, route operators use the polygraph as a supplement to, rather than a substitute for, traditional methods of screening job applicants.

Second, our members do not use polygraph tests as a means of invading employees' privacy. They do not inquire into such matters as religious or political beliefs, or sexual preference. In fact, many operators specifically tell the examiner not to touch on certain topics at all during the interview, and if information on one of these topics is discovered inadvertently, not to mention it to the operator or include it in the written report.

Third, our members recognize the importance of using reputable, highly-trained examiners and state-of-the-art equipment. As a typical example, one of MLA's officers uses the president of the state polygraph association as his examiner.

Our members have found polygraph tests to be a very helpful tool, particularly in screening job applicants. In general, applicants are informed before the first interview that a polygraph test will be administered later in the hiring process, and this leads to a full and frank interview in which prior incidents with employers or law enforcement agencies are disclosed. In some cases, the decision not to hire is made at that point. In other cases, the applicant explains extenuating circumstances involved in the prior incident, the explanation is confirmed by the polygraph, and the applicant is hired. In a third group of cases, problems are not disclosed during the initial interview, but the polygraph test discloses potential problems that are explored through a further interview. In some instances, the problem is a very minor one -- a misunderstood question, for example -- whereas in others the problem is sufficiently serious that the applicant is rejected.

Our members believe that their pre-employment screening process is so effective that the great majority of their employees are very reliable. However, in order to cover all contingencies, some route operators use periodic polygraph tests as an ongoing check and deterrent. In some cases, instances of theft have been uncovered. Polygraph tests have also been used to exonerate employees who were unfairly accused.

Thus, for the members of our industry, polygraph tests are an effective tool [*/] which they use in a responsible

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[*/] Unfortunately, we do not yet have industry-wide statistics available that demonstrate in terms of dollars the reduction of theft due to polygraph testing. However, we would be happy to provide the Committee with statistics and examples from individual members of our industry.

and fair way. We are therefore most concerned that S. 1815 would forbid our members to use polygraph tests. This bill ignores what our members know to be true from their own experience -- namely, that when used for proper purposes by a qualified examiner, polygraph tests are very useful employment tools that do not invade privacy.

Our members would not object to a bill that placed reasonable regulations on the use of polygraph tests. While we believe strongly that such regulation should be left to the states, we note that a bill currently pending before the House Education and Labor Committee, H.R. 3916, takes a more reasonable approach than S. 1815. This bill's purpose is to regulate polygraph tests and prohibit invasions of privacy while permitting employers to use such examinations to protect their businesses and control property losses attributable to employee theft and other acts of misconduct. The bill would set minimum standards for both polygraph examiners and polygraph equipment, and impose safeguards designed to protect privacy and inform employees of their rights. We urge this Committee to study this bill carefully and contrast it with the much more draconian approach of S. 1815.

In summary, when they are used properly and fairly, polygraph tests are a valuable tool for American business. They provide important protection from losses due to employee theft. If their use is prohibited, there would be severe financial consequences for the multi-housing laundry industry. We urge this Committee to take no further action on S. 1815, or in the alternative, to develop a compromise bill that will better balance the rights of the business community and its employees.

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## POLYGRAPH TESTS

Polygraph examinations are being used in both public and private sectors to assist in protecting national security information, inventories and public safety. In the private sector, business and industry are using the polygraph to protect the health and welfare of customers plus billions of dollars in company and stockholder assets.

H.R. 1524 would virtually ban the use of polygraphs in the private sector. The National Apartment Association (NAA), represents over 200,000 multifamily professionals including owners, developers, managers and industry suppliers of over three million rental units and condominiums nationwide. Our members rely on the use of polygraph examinations to help prevent employee theft and to protect residents from being harmed by dishonest employees. The bill has granted an exemption to the security industry as well as nursing homes and child care centers. In many ways, an apartment employee is a combination of all three. Apartment employees generally have access to all units and therefore the personal property of the residents. In addition, they also handle cash. To make matters worse, in several states, employers may be held liable for the illegal actions of their employees against residents. Polygraph testing provides an essential function for the protection of the residents.

NAA recognizes the need for enforcement of guidelines in order to protect against improper and indiscriminate use of the polygraph in the private sector. However, we believe that H.R. 1524 takes an approach that is far too drastic. Not only would the bill impede private industry's ability to police itself but it would also establish a double standard of private and public sector investigations. An approach such as was suggested in H.R. 3916, the Polygraph Reform Act of 1985 would address the problems which many people see are associated with the use of polygraphs in the private sector. The bill would permit the use of polygraph examinations to help prevent employee theft and protect customers from being harmed by dishonest employees. It would create a program for regulating the use of polygraphs in accordance with strict federal standards. H.R. 3916 is a more realistic approach to dealing with the issue of polygraphs and the problems that have developed in many areas of the country. The rental housing industry seeks to provide safe, decent and affordable housing to its residents. The polygraph is an effective tool when used in conjunction with other personnel evaluation procedures.

STATEMENT OF THE NATIONAL ASSOCIATION OF CHAIN DRUG STORES, INC.

## SUMMARY OF STATEMENT & FACT SHEET

### Employee Theft in Drug Stores - Diversion of Controlled Drugs

1. $480 million in losses are suffered by retail corporate drug stores due to internal theft each year.

2. Employee theft accounts for 60 percent of all losses incurred by the Chain Drug Industry.

3. The Drug Enforcement Administration (DEA) reports that 500,000 to one million dosage units are stolen by employees from retail pharmacies, warehouses and trucks in transit each year.

4. According to DEA from January 1984 to March 1985, there were 8,861 drug thefts in the United States. Of this number, DEA reports that 1,376 or 16 percent were employee thefts.

5. Senator Alan Cranston, in a speech given on January 7, 1986, in San Francisco, stated that more than 130 million dosage units of dangerous, highly abused drugs wind up in illicit channels due to thefts, prescription forgeries and robberies of drug shipments.

### Drug Thefts Lead to Increased Drug Abuse - Extent of the Problem

1. 10 million Americans regularly use prescription drugs illicitly. 50 million Americans have used legal drugs illicitly at some point in their lives.

2. The National Institute of Drug Abuse estimates that crime, lost productivity and medical expenses resulting from drug abuse cost the United States $49.6 billion annually.

3. More Americans die from abusing prescription drugs than from using illegal substances.

### Underlining Need and Desireability for a Pharmaceutical Exemption

1. DEA requires all registrants to maintain a comprehensive employee screening program including the use of polygraph testing (CFR Title 21 Part 1301.90).

2. A pharmaceutical exemption would compliment recently passed laws by the 98th Congress pertaining to drug thefts and diversion. P. L. 98-305 and P. L. 98-473.

3. The Federal Government spends some $1.7 billion annually to fight drug related crimes in the United States.

4. On March 12, 1986, the House of Representatives adopted the Eckart-Armey amendment allowing for a pharmaceutical exemption prior to final approval of H. R. 1524.

**NACDS Position**

NACDS and it's 171 corporate members operating 18,000 retail drug stores are opposed to S. 1815 unless an amendment is incorporated into the legislation that would grant an exemption for companies authorized to manufacture, distribute or dispense controlled substances.

## INTRODUCTION

THE NATIONAL ASSOCIATION OF CHAIN DRUG STORES, INC., (NACDS) APPRECIATES THE OPPORTUNITY TO SUBMIT, FOR THE RECORD, WRITTEN TESTIMONY WITH RESPECT TO LEGISLATION (S. 1815 - H. R. 1524) ENTITLED THE POLYGRAPH PROTECTION ACT OF 1985. NACDS IS A NON-PROFIT TRADE ORGANIZATION, FOUNDED IN 1933, WHICH REPRESENTS THE MANAGEMENT OF 171 CHAIN DRUG CORPORATIONS THAT ARE OPERATING IN EXCESS OF 18,000 RETAIL DRUG STORES AND PHARMACIES THROUGHOUT THE UNITED STATES. IN ADDITION, OUR CORPORATE MEMBERS OPERATE APPROXIMATELY 73 WAREHOUSE DISTRIBUTION CENTERS. THE CHAIN DRUG INDUSTRY PROUDLY EMPLOYES CLOSE TO ONE MILLION PEOPLE WHO WORK IN CORPORATE HEADQUARTERS, REGIONAL OFFICES, WAREHOUSING FACILITIES AND IN RETAIL DRUG STORES. COLLECTIVELY, NACDS MEMBERS WERE RESPONSIBLE FOR $25.5 BILLION IN RETAIL SALES IN 1985 AND MORE THAN 540 MILLION PRESCRIPTIONS WERE DISPENSED TO PATIENTS BY CORPORATE DRUG CHAINS DURING THIS SAME PERIOD.

MEMBERS OF THE NATIONAL ASSOCIATION OF CHAIN DRUG STORES RANGE IN SIZE FROM OPERATIONS WITH ONLY FOUR STORES TO COMPANIES WITH MORE THAN 1,700 RETAIL OUTLETS. THUS, OUR TESTIMONY REFLECTS THE VIEWS OF BOTH SMALL BUSINESSES AND LARGE CORPORATE ENTITIES. NACDS DEEPLY APPRECIATES THE OPPORTUNITY TO PARTICIPATE IN THESE HEARINGS AND TO DISCUSS WITH THE COMMITTEE PENDING LEGISLATION (S. 1815 - H. R. 1524) ADDRESSING THE USE OF THE POLYGRAPH EXAMINATIONS AND OTHER FORMS OF WRITTEN INTEGRITY TESTING BY FIRMS ENGAGED IN OR AFFECTING INTERSTATE COMMERCE.

WE BELIEVE, MR. CHAIRMAN, THAT ALL OF US HERE TODAY SHARE SOME VERY BASIC OBJECTIVES AS WE TAKE ON THIS DIFFICULT TASK OF DEBATING THE ISSUE OF POLYGRAPH TESTING IN THE WORKPLACE. WE ALL WANT TO PRESERVE THE INDIVIDUAL'S RIGHT TO PRIVACY AND TO PRESERVE THE RIGHT OF THE WORKER TO SEEK FAIR REMEDIES. BY THE SAME TOKEN, IT IS OUR BELIEF THAT THE CONGRESS ALSO WANTS TO PROTECT BUSINESSES AND THE AMERICAN PUBLIC FROM THE CRIMINAL ELEMENT. AND FINALLY, WE ALL SHARE A DEEP CONCERN AND COMMITMENT TO CONTINUE THE BATTLE AGAINST DRUG THEFT, DRUG TRAFFICING, DRUG ABUSE AND DRUG RELATED CRIMES IN THE UNITED STATES.

## NACDS PRIMARY CONCERN - DRUG SECURITY

WHILE THE PROBLEM OF EMPLOYEE THEFT AGAINST BUSINESS AND RETAILING IS SUBSTANTIAL, EXACTING A TOLL OF SOME $40 BILLION A YEAR IN LOSSES, IT IS THE MORE SENSITIVE ISSUE OF DRUG THEFT THAT NACDS WISHES TO ADDRESS IN RELATIONSHIP TO THE PENDING LEGISLATION. THEREFORE, OUR STATEMENT WILL FOCUS ON THE UNDERLINING NEED TO PROVIDE FOR A FAIR AND REASONABLE EXEMPTION FOR THOSE COMPANIES THAT ARE AUTHORIZED TO MANUFACTURE, DISTRIBUTE OR DISPENSE CONTROLLED SUBSTANCES. MORE SPECIFICALLY, WE ARE ASKING THE CONGRESS TO GRANT OUR INDUSTRY A MODEST BUT CRITICALLY IMPORTANT EXCLUSION SO THAT THE TIGHTEST POSSIBLE SECURITY MEASURES WHICH INCLUDE THE POLYGRAPH, WRITTEN INTEGRITY TESTS AND OTHER PROCEDURES CAN CONTINUE TO BE UTILIZED FOR THE PURPOSE OF MINIMIZING DRUG LOSSES. IN OUR VIEW, THE PHARMACEUTICAL COMMUNITY, BY THE VERY NATURE OF ITS BUSINESS, MUST BE HELD ACCOUNTABLE TO THE HIGHEST STANDARD OF PUBLIC TRUST. EVERY PRECAUTION SHOULD BE

EXERCISED TO INSURE THE SAFETY, INTEGRITY AND SECURITY OF THE POTENT MEDICATIONS THAT WE MAKE, DISTRIBUTE AND SELL TO PATIENTS.

THE COMPANIES THAT BELONG TO THE NATIONAL ASSOCIATION OF CHAIN DRUG STORES DISTRIBUTE AND DISPENSE PRESCRIPTION DRUGS, AND SOME MEMBER FIRMS ARE ENGAGED IN THE MANUFACTURING OF LEGEND PRODUCTS. OUR RETAIL STORES HAVE AVAILABLE POTENT MEDICINES THAT PHYSICIANS PRESCRIBE FOR MILLIONS OF PEOPLE TO EASE THEIR PAIN AND SUFFERING AND, IN SOME INSTANCES, TO SUSTAIN LIFE ITSELF. THESE SAME MEDICATIONS, THOUGH, WHEN STOLEN AND DIVERTED FROM RETAIL PHARMACIES AND PUT TO IMPROPER USE, CAN WRECK LIVES AND RESULT IN DEATH.

## MAGNITUDE OF DRUG THEFTS FROM RETAIL PHARMACIES - WAREHOUSES

THE DRUG ENFORCEMENT ADMINISTRATION (DEA) ESTIMATES THAT EMPLOYEES ARE STEALING BETWEEN 500,000 TO MORE THAN ONE MILLION DOSAGE UNITS OF DANGEROUS DRUGS EACH YEAR FROM PHARMACIES, WAREHOUSING FACILITIES AND TRUCKS IN TRANSIT. THE DEA HAS STATED THAT DRUG THEFTS ARE BEING COMMITTED AT THE RATE OF ABOUT ONE PER HOUR IN THE UNITED STATES AND THAT 16 PERCENT OF THOSE THEFTS ARE COMMITTED BY EMPLOYEES. SENATOR ALAN CRANSTON EARLIER THIS YEAR STATED THAT 130 MILLION DOSAGE UNITS OF DANGEROUS MEDICATIONS ARE BEING DIVERTED FROM LEGITIMATE BUSINESSES TO STREET TRAFFICERS FOR PROFIT.

THE PRESCRIPTION DRUGS STOLEN FROM OUR COMPANIES END UP IN ILLICIT CHANNELS AND EVENTUALLY FIND THEIR WAY INTO THE HANDS OF DRUG ABUSERS AND OUR YOUNG

PEOPLE. DRUG ABUSE HAS BECOME A FRIGHTENING NATIONAL EPIDEMIC WITH VIRTUALLY NO PREFERENCE TO AGE, SEX, RACE, RELIGION OR ECONOMIC BACKGROUND. IT IS ESTIMATED THAT AT LEAST 10 MILLION AMERICANS REGULARLY USE PRESCRIPTION DRUGS ILLICITLY AND THAT FIVE TIMES THAT MANY PEOPLE HAVE USED PRESCRIPTION DRUGS ILLICITLY AT SOME POINT IN THEIR LIVES. IT IS INDEED A SAD COMMENTARY BUT MORE PEOPLE DIE FROM ABUSING PRESCRIPTION DRUGS THAN FROM USING ILLEGALLY PRODUCED HARD DRUGS. THE NATIONAL INSTITUTE OF DRUG ABUSE ESTIMATES THAT CRIME, LOST PRODUCTIVITY AND MEDICAL EXPENSES RESULTING FROM DRUG ABUSE, COST OUR NATION $49.6 BILLION ANNUALLY.

DRUG ABUSE HAS ALSO BECOME A MAJOR PROBLEM IN THE WORKPLACE, BRINGING WITH IT EXCESSIVE ABSENTEEISM, POOR JOB PERFORMANCE, MORE ACCIDENTS AND INJURIES AND INCREASED INTERNAL THEFT. THE SITUATION HAS BECOME SO SERIOUS THAT MORE AND MORE COMPANIES ARE FINDING IT NECESSARY TO SCREEN EMPLOYEES AND APPLICANTS FOR DRUG USE. ACCORDING TO ONE RECENT SURVEY, AT LEAST ONE-FOURTH OF ALL FORTUNE 500 COMPANIES NOW SCREEN FOR DRUG USE AND THIS NUMBER IS EXPECTED TO DOUBLE IN FIVE YEARS. THERE IS ALSO GROWING EVIDENCE LINKING DRUG ABUSE AND CRIME. A RECENT SURVEY OF INMATES IN STATE PRISONS ACROSS THE COUNTRY FOUND THAT ONE-THIRD OF THE PRISONERS WERE UNDER THE INFLUENCE OF DRUGS AT THE TIME OF THEIR OFFENSE.

WE IN THE CHAIN DRUG INDUSTRY ARE DEEPLY CONCERNED ABOUT THE TERRIBLE HUMAN SUFFERING THAT CAN RESULT FROM THE ABUSE OF PRESCRIPTION DRUGS AND THE USE OF ILLEGAL SUBSTANCES. THROUGHOUT THE YEARS, NACDS AND OUR CORPORATE MEMBERS HAVE WORKED DILIGENTLY WITH FEDERAL AND STATE GOVERNMENTAL LAW ENFORCEMENT AGENCIES TOWARD ESTABLISHING ADEQUATE SAFEGUARDS FOR

PRESCRIPTION DRUGS, ESPECIALLY CONTROLLED SUBSTANCES. THE CHAIN DRUG INDUSTRY HAS SPENT HUGE SUMS OF MONEY TO STRENGTHEN THE SECURITY OF AREAS WHERE CONTROLLED SUBSTANCES ARE STORED. AND THE INDUSTRY HAS FURTHER CARRIED OUT AN EXTENSIVE PROGRAM OF POLYGRAPH EXAMINATIONS, INTEGRITY TESTS AND CRIMINAL BACKGROUND CHECKS IN AN EFFORT TO IDENTIFY POTENTIAL SECURITY RISKS AMONG THOSE INDIVIDUALS WHO WOULD BE WORKING IN AND AROUND AREAS WERE NARCOTICS ARE KEPT.

## DEA SUPPORTS POLYGRAPH USE

BANNING THE USE OF THE POLYGRAPH EXAMINATION, MR. CHAIRMAN, WOULD DEPRIVE THE RETAIL DRUG STORE INDUSTRY, BOTH CHAIN AND INDEPENDENTS, AS WELL AS WHOLESALERS AND MANUFACTURING COMPANIES, AN IMPORTANT WEAPON IN OUR BATTLE AGAINST THE THEFT AND ABUSE OF DRUGS. BANNING THE POLYGRAPH IN THE PHARMACEUTICAL INDUSTRY WOULD ALSO GREATLY UNDERMINE THE FEDERAL GOVERNMENT'S AGGRESSIVE CAMPAIGN AGAINST ILLICIT DRUG TRAFFICING AND DRUG ABUSE -- A CAMPAIGN THAT IS LEAD BY NONE OTHER THAN THE FIRST LADY, NANCY REAGAN. THE OUTLAY BY THE FEDERAL GOVERNMENT TO FIGHT DRUG DEALING AND RELATED CRIMES EXCEEDS $1.7 BILLION A YEAR.

IT SHOULD BE NOTED THAT THE DRUG ENFORCEMENT ADMINISTRATION SUPPORTS THE CONTINUED USE OF POLYGRAPH TESTING BY FIRMS THAT HANDLE CONTROLLED DRUGS. A RECENT LETTER FROM THE DEA TO NACDS REFLECTING THIS POSITION READS AS FOLLOWS:

> "THE DEA IS OF THE VIEW THAT POLYGRAPH TESTING IS ONE OF THE EFFECTIVE MEANS TO USE DURING THE INITIAL HIRING PROCESS OF EMPLOYEES AND IN INVESTIGATING MATTERS CONCERNING EMPLOYEES WHO HAVE ACCESS TO CONTROLLED SUBSTANCES. THE POLYGRAPH EXAMINATION IS AN EFFECTIVE MEANS OF DETERMINING IF APPLICANTS HAVE A CRIMINAL BACKGROUND OR A HISTORY OF DRUG USE. IT HAS PROVEN ITS EFFECTIVENESS IN THIS AREA OVER THE YEARS. REGISTRANTS UTILIZING THIS PROCEDURE ARE TO BE COMMENDED FOR THEIR EFFORTS TO REDUCE THE DIVERSION OF CONTROLLED SUBSTANCES."

*THE DEA LETTER IS INCLUDED WITH THE NACDS TESTIMONY.

UNLIKE ONE PROFESSIONAL ORGANIZATION, THE AMERICAN PHARMACEUTICAL ASSOCIATION (APhA), WHICH IS IN FAVOR OF A COMPLETE BAN ON THE USE OF POLYGRAPH TESTS ON EMPLOYEES WHOSE DUTIES BRING THEM IN CONTACT WITH DANGEROUS DRUGS, THE NATIONAL ASSOCIATION OF CHAIN DRUG STORES, INC., (NACDS) IS OF THE OPINION THAT A PROBLEM OF THIS MAGNITUDE CANNOT BE DEALT WITH FROM A VERY LIMITED PERSPECTIVE AND AFTER THE FACT. ON THE ONE HAND, THE APhA IS AGAINST THE USE OF THE POLYGRAPH TO MINIMIZE DRUG LOSSES, BUT THE ORGANIZATION CONTRADICTS ITSELF BY OFFERING A NATIONWIDE PROGRAM TO HELP THOSE PHARMACISTS THAT HAVE FALLEN VICTIM TO DRUG ABUSE. WE COMMEND THE APhA FOR THEIR PROGRAM OF AIDING IMPAIRED PHARAMCISTS, BUT NACDS FIRMLY BELIEVES THAT IF THE CONGRESS WERE TO BAN THE POLYGRAPH MORE PHARMACISTS WOULD BE TEMPTED TO STEAL AND ABUSE DANGEROUS DRUGS. THEREFORE, WE SUPPORT PREVENTIVE MEASURES ALONG WITH REMEDIAL PROGRAMS TO COMBAT DRUG ABUSE AND DRUG RELATED CRIMES.

## PHARMACEUTICAL EXEMPTION WOULD COMPLIMENT LAWS PASSED BY 98th CONGRESS

PROVIDING AN EXEMPTION FOR THE PHARMACEUTICAL INDUSTRY CLEARLY COMPLIMENTS OTHER LEGISLATION THAT THE CONGRESS HAS ENACTED INTO LAW TO MINIMIZE THE THEFT AND DIVERSION OF DANGEROUS DRUGS. DURING THE 98th CONGRESS, THE CONTROLLED SUBSTANCE REGISTRANT PROTECTION ACT OF 1984 (P. L. 98-305) WAS APPROVED. THIS LANDMARK PIECE OF LEGISLATION MADE, FOR THE FIRST TIME, CERTAIN TYPES OF ARMED ROBBERIES AND BURGLARIES OF RETAIL PHARMACIES, WAREHOUSES AND FROM OTHER REGISTRANTS TO OBTAIN CONTROLLED SUBSTANCES A FEDERAL CRIME. IN ESSENCE, CONGRESS FOUND IT NECESSARY TO PASS A LAW TO PROTECT DRUG STORES FROM THE GROWING NUMBER OF VIOLENT CRIMES INVOLVING THE THEFT OF DRUGS BY FORCE. THAT SAME YEAR, FEDERAL LAWMAKERS ALSO APPROVED THE DIVERSION CONTROL AMENDMENTS AS PART OF THE COMPREHENSIVE CRIME CONTROL ACT OF 1984 (P. L. 98-473). THE PURPOSE OF THIS STATUTE IS TO PROVIDE FOR MORE EXTENSIVE ACCOUNTABILITY AND RECORDKEEPING AMONG PRACTITIONERS THAT PRESCRIBE, ADMINISTER AND DISPENSE CONTROLLED SUBSTANCES IN THE LAWFUL COURSE OF THEIR PROFESSIONAL PRACTICE. IN BRIEF, THE CONGRESS FAVORED STRONGER CONTROL OVER PHYSICIANS SIMILAR TO THOSE ALREADY IN PLACE FOR DRUG STORES AND WAREHOUSES SO THAT POTENT SUBSTANCES COULD BE TRACED AT THE PRACTITIONER LEVEL.

TO THIS END, WE BELIEVE THAT THE AMENDMENT, AS ADOPTED BY THE HOUSE OF REPRESENTATIVES, IS VERY CONSISTENT WITH THE ON-GOING LEGISLATIVE APPROACH THAT THE CONGRESS HAS BEEN TAKING ON DRUG ISSUES.

## ECKART-ARMEY PHARMACEUTICAL EXEMPTION

IN REVIEW, THE PHARAMCEUTICAL AMENDMENT OFFERED BY REP. DENNIS ECKART (D-OHIO) AND REP. RICHARD ARMEY (R-TEXAS) REFLECTS A MOST SENSIBLE AND PRUDENT ACCOMMODATION FOR THE CONTINUING AVAILABILITY OF THE POLYGRAPH FOR THE DRUG INDUSTRY. THE AMENDMENT ALLOWS FOR, BUT DOES NOT MANDATE, POLYGRAPH TESTING. IT WOULD PERMIT RETAIL DRUG STORES TO CAREFULLY PRE-SCREEN APPLICANTS IN ORDER TO ASCERTAIN IF THESE INDIVIDUALS HAVE A DRUG ABUSE PROBLEM AND FOR INVESTIGATIVE PURPOSES CONCERNING SHORTAGES OF DRUGS. IN THE HOUSE PROVISION AS ADOPTED, CERTAIN SAFEGUARDS AND PARAMETERS WERE ESTABLISHED. THE AMENDMENT WOULD NOT PRE-EMPT EXISTING STATE LAWS THAT EXPLICITLY OR IMPLICITLY LIMIT OR PROHIBIT THE USE OF LIE DETECTOR TESTS AND ANY NEGOTIATED COLLECTIVE BARGAINING AGREEMENTS. FINALLY, AND VERY IMPORTANT, IS THAT THE ECKART-ARMEY AMENDMENT CLEARLY STATES THAT THE RESULTS OF THE POLYGRAPH CANNOT BE USED AS THE SOLE BASIS FOR A BUSINESS TO DECIDE WHETHER TO FIRE AN EMPLOYEE OR NOT HIRE AN APPLICANT. NACDS BELIEVES THAT THE RESULTS OF POLYGRAPH TESTS SHOULD NEVER BE THE SOLE DETERMINING FACTOR IN SCREENING APPLICANTS OR IN TERMS OF AN INVESTIGATION.

MR. CHAIRMAN, WITH ONLY MINOR CHANGES, NACDS WISHES TO ENDORSE THE HOUSE APPROVED PHARMACEUTICAL EXEMPTION AS CONTAINED IN H. R. 1524. IN APPROVING THIS CRITICALLY IMPORTANT AMENDMENT, THE HOUSE OF REPRESENTATIVES STIPULATED THAT THE POLYGRAPH COULD ONLY BE GIVEN TO PROSPECTIVE EMPLOYEES AND CURRENT EMPLOYEES HAVING "DIRECT ACCESS" TO THE MANUFACTURE, STORAGE, DISTRIBUTION OR SALE OF CONTROLLED SUBSTANCES. WE BELIEVE THAT THE TERM "DIRECT" NEEDS

TO BE CHANGED TO "REASONABLE" ACCESS. WITH THIS MINOR BUT IMPORTANT REVISION, THE AMENDMENT WOULD ALLOW FOR NECESSARY SAFEGUARDS TO COMBAT SITUATIONS OF CONSPIRACY OR COLLABORATION WITHIN A STORE OR DISTRIBUTION CENTER INVOLVING THE THEFT OF DRUGS.

FOR EXAMPLE, WITH THE ADVENT OF COMPUTERS BEING UTILIZED EXTENSIVELY AT CORPORATE HEADQUARTERS AND IN WAREHOUSING FACILITIES COUPLED WITH THE USE OF COMPUTER TERMINALS IN PHARMACY DEPARTMENTS AT THE STORE LEVEL, NACDS IS VERY WORRIED ABOUT THE MINIPULATION OF RECORDS BY INDIVIDUALS FAR REMOVED FROM AREAS WHERE CONTROLLED SUBSTANCES ARE KEPT WHEREBY MORE SOPHISTICATED FORMS OF DRUG THEFTS COULD GO UNDETECTED. MANY OF OUR CORPORATE MEMBERS THAT HAVE COMPUTER SYSTEMS IN PLACE HAVE ADVISED NACDS OF THEIR CONCERN REGARDING THE FALSIFICATION OF RECORDS AND INFORMATION THAT HELP TRACK AND ACCOUNT FOR THE MOVEMENT OF DANGEROUS DRUGS WITHIN THE COMPANY.

THUS, WE FIRMLY BELIEVE THAT IN ORDER TO PROVIDE FOR ADEQUATE PROTECTION TO DEAL WITH POTENTIAL PROBLEMS OF CONSPIRACY INVOLVING RECORDKEEPING AND THE ALTERATION OF INFORMATION TO HIDE A DRUG THEFT, THE AMENDMENT MUST BE CHANGED. WE URGE THE COMMITTEE TO ACCEPT THE HOUSE AMENDMENT FOR A PHARMACEUTICAL EXEMPTION AND TO CHANGE THE WORD "DIRECT" TO "REASONABLE" REGARDING ACCESS TO CONTROLLED SUBSTANCES.

POLYGRAPH TESTS ARE USED EXTENSIVELY BUT PRUDENTLY THROUGHOUT THE CHAIN DRUG INDUSTRY. NACDS SURVEYED OUR MEMBERS THIS PAST YEAR AND FOUND THAT 80 PERCENT OF THE RESPONDING COMPANIES USE THIS INVESTIGATIVE DEVICE.

FURTHER, WE LEARNED FROM OUR SURVEY THAT OF THOSE COMPANIES UTILIZING THE POLYGRAPH MORE THAN 90 PERCENT CONSIDER THE TEST TO BE ESSENTIAL AND THAT A MAJORITY EXPERIENCED A DECLINE IN INTERNAL THEFTS AFTER BEGINNING A SECURITY PROGRAM THAT INCLUDED THE USE OF THE POLYGRAPH. FINALLY, IT SHOULD BE NOTED THAT A FAIR NUMBER OF OUR CORPORATE MEMBERS WILL ONLY USE THE POLYGRAPH AS A LAST RESORT IF ALL OTHER PROCEDURES FAIL TO UNCOVER THE INDIVIDUAL OR INDIVIDUALS RESPONSIBLE FOR A THEFT.

TO THIS END, IN EXPRESSING OUR SUPPORT AND ENDORSEMENT FOR THE PHARMACEUTICAL AMENDMENT, NACDS BELIEVES VERY SINCERELY THAT THE AVAILABILITY RATHER THAN THE ACTUAL USE OF THE POLYGRAPH CAN SERVE AS A VERY STRONG DETERENT TO DRUG THEFTS.

ARE THERE STATISTICS AVAILABLE THAT DEMONSTRATE CLEARLY THAT THE USE OF POLYGRAPH TESTING HAS RESULTED IN REDUCED CRIME RATES? OBVIOUSLY, A CLEAR DEMONSTRATION OF THIS TYPE IS IMPOSSIBLE. ONE WOULD BE HARD PRESSED TO PROVE WHY A CRIME HAS NOT BEEN COMMITTED. HOWEVER, FROM VERY SKETCHY DATA ONE MAY ARGUE THAT THERE IS A CORRELATION BETWEEN CRIME RATES AND POLYGRAPH TESTING. NATURALLY, THOSE WHO OPPOSE THE USE OF LIE DETECTORS WILL CONTEND THAT SUCH CORRELATIONS ARE INVALID. NEVERTHELESS, CONSIDER THESE DATA: ONE CORPORATE DRUG CHAIN BY USING THE POLYGRAPH ALONG WITH OTHER SECURITY PROCEDURES, REFERENCE CHECKS, AND INTEGRITY TESTING REDUCED LOSSES OF PROFIT FROM 4% TO 1.5% IN LESS THAN THREE YEARS. ANOTHER CORPORATE DRUG CHAIN SUSPENDED POLYGRAPH TESTING IN ITS BALTIMORE FACILITIES. INTERNAL THEFT BEGAN TO INCREASE UNTIL THE POLYGRAPH POLICY WAS REINSTATED.

## CONCLUSION

NACDS, THEREFORE, URGES THE COMMITTEE TO ADOPT A PHARAMCEUTICAL AMENDMENT REFLECTIVE OF THE ECKART-ARMEY LANGUAGE AS APPROVED BY THE HOUSE OF REPRESENTATIVES IN H. R. 1524 WITH THE SLIGHT MODIFICATIONS THAT WE HAVE OUTLINED. IF SUCH A PROVISION IS INCORPORATED INTO S. 1815, WE WILL BE ABLE TO BETTER GUARANTEE THE SAFETY, INTEGRITY AND SECURITY OF THE MANY PRESCRIPTION DRUG PRODUCTS AND CONTROLLED SUBSTANCES THAT OUR CORPORATE MEMBERS MAKE, TRANSPORT, STOCK AND DISPENSE TO PATIENTS. FINALLY, WE ASK FOR CLARIFICATION THAT THE LEGISLATION IS NOT INTENDED TO BAN OR RESTRICT THE USE OF WRITTEN INTEGRITY TESTS. THESE WRITTEN TESTING PROCEDURES ARE VERY IMPORTANT TO THE CHAIN DRUG INDUSTRY'S OVERALL SECURITY PROGRAM.

THANK YOU FOR THE OPPORTUNITY TO PROVIDE THIS TESTIMONY FOR THE RECORD. NACDS TRUSTS THAT OUR STATEMENT WILL BE GIVEN FULL AND CAREFUL CONSIDERATION.

## NACS POLYGRAPH TESTIMONY

CHAIRMAN HATCH AND THE DISTINGUISHED MEMBERS OF THE COMMITTEE:

My name is Kerley LeBouef and I am president and chief executive officer of the National Association of Convenience Stores, a non-profit trade association representing approximately 1,200 retail enterprises operating 46,000 retail convenience stores in all 50 states, employing nearly 400,000 people.

As defined by the industry, a convenience store operation includes a building containing from 1,000 to 3,200 square feet, with suitable on-premise parking for customer service. The product mix offered by convenience stores include items from the following categories: dairy, bakery, snack foods, beverage, tobacco, grocery, health and beauty aids, confectionery, and may also include prepared foods to go, fresh meats (frozen), deli items, gasoline, various services and limited product items.

The average convenience store is open 24 hours and offers many services including microwave ovens for warming ready-to-eat foods; the issuance of money orders, check cashing privileges, and fountain drinks.

More than half of all convenience stores also sell gasoline on-premise, and the average convenience store with a gasoline operation sells 42,000 gallons of gas per month.

Because of their relatively small size, the average convenience store employs 6 workers, usually working three shifts, with two people per shift. In an average store, one employee works the cash register/gas window and the other employee works the deli operation and manages stock.

## POLYGRAPH USE IN THE CONVENIENCE STORE INDUSTRY

Naturally, convenience store employees deal with a lot of cash, both from the sale of retail items and the sale of gasoline. In addition, many convenience stores also sell beer and wine. Because of these factors, convenience store owners and operators utilize polygraph testing (a) to screen personnel prior to hiring (b) as one of many aids in theft detection, and (c) as a deterrent to employee theft.

As you have undoubtedly heard from numerous others, the problem of inventory shrinkage in the retail environment has become increasingly hard to control, and American consumers are forced to pay higher prices for business' inability to continually monitor and control employees' activities. In the convenience store industry, polygraph testing helps control shrinkage, thus reducing consumer costs.

When polygraph testing is used, it is normally at the request of the parent company who employs certified polygraphers. Polygraph examinations are given by qualified examiners and generally last less than one hour. All questions asked of employees are submitted to the employee ahead of time. All test results are keep in strict confidence.

Our industry has been told by one of its polygraphers, John Elbon, security director of U-Save Supermarkets and B&B Cash Grocery of Tampa and Fort Meyers, Florida, that polgraph examinations frequently elicit pre-test admissions to guilt or wrongdoing from subjects, thus eliminating the need for further polygraph examination.

## OPPOSITION TO S.1815

The National Association of Convenience Stores strongly opposes the intent of S.1815, but nonetheless recognizes the need for urgent changes in existing regulations pertaining to polygraph usage and testing procedures. NACS is willing and able to work with the members of this Committee and the U.S. Congress to enact legislation that strengthens the reliability of polygraph testing by requiring stringent polygraph guidelines, uniform training of polygraphers, and federal regulations to insure uniformity.

Frequent criticism is raised pertaining to the reliability of both the polygraph instrument and the polygrapher. But yet, in testimony after testimony IN FAVOR of a ban on polygraphs in the private sector, proponents make exceptions for polygraph testing in the public sector, citing national security and public health. No two areas of national concern are more important, and the mere suggestion of an exemption of a polygraph ban for these two areas would appear to be an endorsement of the polygraph's reliability as a tool to help maintain and insure national security and the public's health.

Based on the exemptions for national security and the public health, I submit that, when properly used and administered, polygraph testing is, indeed, a useful and reliable tool in weeding out potentially undesirable employees. The National Association of Convenience Stores seriously doubts that if there was any question about the reliability of a properly administered polygraph test, that the U.S. Congress would allow its use to aid in protecting two such vital national concerns as civilian and military security and the general public health.

Obviously, when properly applied, polygraph testing is the best available means to help in the investigation of serious criminal conduct, including the use of drugs by employees, inventory theft, and company record falsification, including job applications.

Therefore, we are calling upon the members of the Senate Committee on Labor and Human Resources to enact polygraph reform legislation that would satisfy the following criteria:

- a polygraph examinee's bill of rights which requires full disclosure to the examinee of his rights, authorizes the examinee to receive copies of opinions and conclusions reached by the examiner, and requires examinations to be conducted on a voluntary basis.

- comprehensive federal standards for polygraph examiners and examinations that insure that each examiner is properly qualified, asks no questions concerning a person's religion, sexual preferences, union activities and other matters inappropriate in the employment context, and specifies the types of conclusions that the examiner is permitted to make.

- prohibition against an employer making a personnel decision based solely on conclusions reached or opinions made by an examiner.

- prohibition against any attempt to waive an individual's rights

- imposition of fines up to $10,000 against any person who violates the rights of an examinee, with authorization for victims to seek full relief in federal district court if such relief is not available in state court.

- imposition of a continuing education requirement for all polygraphers.

- requirement that each State or other political subdivision desiring to administer a regulatory program certify to the Secretary of Labor that it has adopted an administrative plan meeting the above standards.

These criteria are set forth in a previously-defeated bill, H.R.3916, the Polygraph Reform Act of 1985, introduced by U.S. Representatives Buddy Darden and Bill Young.

The National Association of Convenience Stores strongly endorses the Young-Darden solution to polygraph abuse in the private sector, and I am calling up you, Mr. Chairman, and other members of the Senate Committee on Labor and Human Resources to give this approach your strongest consideration.

Thank you again for allowing the National Association of Convenience Stores the opportunity to share our views on this critical issue.

## STATEMENT OF THE NATIONAL GROCERS ASSOCIATION

Introduction. The National Grocers Association (N.G.A.) takes this opportunity to submit the views and position of its retail grocers and food wholesaler members on S. 1815, the Polygraph Protection Act of 1985. The N.G.A. represents the independent sector of the food distribution industry, including over 2,000 retail grocery firms and 60 wholesale distribution companies. N.G.A.'s retail members operate convenience stores, supermarkets and superstores. N.G.A.'s sixty wholesale food distribution centers distribute food and grocery products to retail grocers in all 50 states.

Retail grocery and food wholesaling businesses are characterized by a high dollar volume of inventory, and a high number of annual inventory turns. In 1985 food retailing had annual sales of over $292 billion in consumer products and an average industry net profit margin of approximately 1.5 percent.

In low profit, labor intensive industries, such as food retailing and wholesaling, the employee serves as a key component in assuring successful business operations. As an industry, the food distribution's employee work force is known for its high efficiency, productivity and customer service. N.G.A. members constantly work to encourage a spirit of trust, cooperation and customer service at all levels of their work force. A recent Gallup Poll showed that supermarkets earned the highest ratings of customer satisfaction when compared to other service industries.

However, it is a fact of life that there are unfortunate incidents, involving internal theft, drug abuse, and other criminal acts, when an individual can do substantial harm to a company. It is just such incidents which have led retail grocers and food wholesalers to use the polygraph as part of an overall effort to promote employee honesty and protect the assets of their company.

As the debate on the proper use of polygraph tests in the private sector continues in the United States Senate, food retailers and wholesalers oppose S.1815's complete ban on private sector employers' right to use polygraph tests, and encourage Senators to seek an appropriate balance between the rights of individuals and those of private sector employers. Perhaps this was best said by one of N.G.A.'s Nebraska retailers:

> "At a time when so many businesses are hard pressed to make a profit it becomes more important to have honest employees.
>
> We are in the retail grocery business and profits are very slim. We must guard against shoplifting as well as internal theft. One of the ways of guarding against internal theft is by giving prospective employees a polygraph test before hiring and at future periods through their employment. It is estimated that 50% of retailers' shrinkage comes from internal theft.
>
> The polygraph test results in hiring better quality employees and also makes for better morale because employees are working with honest people and if losses do occur the honest employee is exonerated.
>
> We realize polygraph tests are not perfect, but are one of the best tools available. We only wish to know the employees are honest, do not have a drug problem, or drinking problem.

> We use only licensed polygraphers and the rights of the individual are protected. We must not overlook the rights of honest individuals to work with honest and decent people. I urge you (Congress) to please not take away this tool of management to screen out the dishonest employees."

S. 1815- The Polygraph Protection Act of 1985. S. 1815 would prohibit the use of lie detectors by private employers, with limited exceptions, as one tool for pre-employment screening, or in discharging, dismissing or disciplining an employee. The prohibition against the use of lie detectors would include polygraphs, deceptographs, voice stress analyzers, psychological stress evaluators, or any similar device using mechanical, electrical or chemical methods as a truth verifier.

It is important to note that S. 1815 would permit the use of polygraph tests by the United States Government, a state government, city, or other political subdivision. As an exception to the ban on private employer use, personnel of Department of Defense contractors with access to classified information could be subjected to polygraph examinations as well. S. 1815 would preempt all current state regulations.

In introducing S. 1815, Senator Hatch noted that the bill attempts to strike a legitimate balance between governmental needs and the rights of working men and women. He also stated that the bill as introduced does not address arguments from employers that polygraph tests are the only effective means at their disposal for assertaining the veracity of employment applications, locating drug or similar types of abuse among employees or rooting out crime in their work force.

It is specifically for that reason that it is now time for the Senate to focus on the need to strike a legitimate balance between the needs of private sector employers and the rights of working men and women. Private employers should be permitted the use of "lie detectors" the same as federal, state, and local governments. There should not be a double standard.

State Regulation. Currently 31 states and the District of Columbia have regulated the use of polygraph tests by employers. Clearly, many states have struck a balance on behalf of private employers, such as food retailers and wholesalers, to use polygraphs as a legitimate tool in detecting internal theft, drug theft problems, and other illegitimate employee activities. N.G.A. members feel strongly, that the states have determined, that there is a legitimate place for polygraph testing as one tool in employment decisionmaking. Federal legislators who desire to create uniformity in state regulations, should not do so by an outright prohibition. A more balanced approach would be to establish uniform guidelines and minimum standards built upon present state regulations.

Grocery Distribution Industry. Food retailers and wholesalers employ millions of full-time and part-time employees to assure the efficient and safe distribution of food, drug, and other grocery related products to consumers. The industry handles a high dollar volume of consumer products, substantial amounts of cash and checks, and has a net profit margin of approximately 1 percent. Food retailers and wholesalers have a necessary business incentive to assure the integrity and honesty of their work force. It is important to protect against internal theft of consumer products, drug theft, embezzlement, and other misappropriation of funds.

According to the Sparagowski report on "shrinkage" 65% of thefts from retail establishments are attributable to employee theft. Placed in the context of the fact that the retail industry alone suffers $10 billion in losses from employee theft every year the magnitude of the problem becomes compelling.

In an industry with an annual profit margin of approximately 1% it is impossible for food retailers to absorb such losses and it unnecessarily adds to the cost of food. Estimates are that internal theft can increase consumer prices as much as 15%.

The Drug Enforcement Administration reports that there are approximately 10,000 thefts of drugs and controlled substances each year. Fifteen percent of these drug related thefts are reported to come from employee theft. Food retailers frequently have pharmacies in their stores, and wholesalers frequently handle drug products as distributors.

Recent incidents of product tampering have increased public and inustry concern for assuring consumer safety in the consumption of food and drug products. The need to maintain the integrity and safety of America's food system is significant national priority. Every legitimate method of deterrence and protection, including polygraph testing, must be utilized in preventing injury to consumers and businesses by criminal product tampering.

The polygraph test is a tool which food retailers and wholesalers may use in attempting to detect and determine individuals who are most likely to have engaged in criminal activity. It also affords an opportunity to absolve those who are innocent. Food retailers and wholesalers who use polygraphs do so in pre-employment screening to place employee candidates in jobs where they are most likely to be successful and minimize any temptation for criminal activity. Perhaps the sentiments of individual food retailers and wholesalers best summarize the impact of S. 1815's complete ban on the use of polygraph tests. A Utah retail grocer states:

> "I believe as an employer I have the right to hire honest people. Honest employees allow me to keep retail food costs down.
>
> I believe other employees have a right to work in an honest environment, free from the suspicion of the wrongdoings of others.
>
> I feel I have a responsibility to keep drug problems out of my business. Anyone using controlled drugs poses a high risk to the safety and welfare of others as well as the business."

A Kansas food wholesaler writes on behalf of his company and the 760 retail supermarkets that he serves:

> "The prohibition of the use of polygraph tests in screening potential and existing employees would deprive both retailers and wholesalers of an important and useful tool in investigating internal theft. The elimination of the use of lie detectors would encourage crime and raise food prices. The existing law is adequate to protect the employees from discriminatory or arbitrary acts of employers."

A retailer from Virginia operating six supermarkets and ten convenience stores has used the polygraph test since 1972 and states:

> "This tool has proved to be invaluable in uncovering embezzlements, narcotic dealers as possible employees, etc.
>
> I realize pressure is being placed on polygraph examinations but I feel the "Polygraph Protection Act of 1985" is an 'overbroad prohibition'."

A Nebraska wholesaler expresses his concern and that of his 325 independent retailers regarding S. 1815:

> "This is a most important means for us since polygraph tests are a useful tool for investigating internal theft which can be a major problem for retailers and wholesalers.
>
> Clear minimum standards to protect both employers and employees are appropriate, but S. 1815 is an overbroad prohibition which interferes with the relationship between business managers and employees. As an alternative allow private employers to use polygraph tests but set appropriate standards for such tests and minimum qualifications for examiners."

A California retailer urges Congress:

> "Please do not put through a law that prohibits the use of polygraphs. Dope and theft are real problems, and have been growing as problems. We have so few tools to protect ourselves and the public. Such problems do raise prices!
>
> We have been using polygraph as a selective employment tool for several years. It is not infallible, but has been an effective and well accepted tool."

The Retail Grocers Association of Florida stresses:

> "A valued tool of our industry in the hiring process is a polygraph (lie detector) test. While we don't regard it as the sole answer to all potential employee security problems, it does have its place in the process by which we can assure we are hiring the best possible person for the job.
>
> We believe that all reasonable methods should be allowed to help insure the most trustworthy are employed in Florida's supermarkets and convenience stores. The use of polygraphs in pre-employment screening is one such reasonable method."

A California retailer writes:

> "The polygraph has been a most important and vital resource to us here in the market where we have a large staff (55) in an isolated community selling many sensitive items such as liquor and ammunition. Loss of this tool could seriously impair our proper choice and good relationships with our employees."

Deficiencies of S. 1815. A prohibition on the use of polygraph tests by private sector employers would be unwarranted and inconsistent public policy. Food retailers and wholesalers handling such important consumer products as food, drugs and related grocery products find it impossible to understand the rational that would outlaw their ability to use polygraph tests, while approving its use by state and local governments. It is just as important to public health and safety to operate an honest and efficient food distribution system as it is to run honest and efficient governmental agencies. Polygraph tests are needed because the realities of business in this country dictate that theft, fraud and abuse be controlled. This need is just as important in the private sector as it is in the public sector.

Permitting polygraph tests to be used in the hiring and investigation of employees in state and local governments recognizes that the use of polygraph tests should not be prohibited. Polygraph testing in employment settings, be it pre-hiring interviews or internal investigations, can be an effective device when used properly. S. 1815 establishes a double standard - strongly supporting legislation to allow the government to conduct polygraph tests of prospective employees, while saying to private businesses that the results of such testing are inaccurate and unfair and therefore cannot be used. The use of polygraph testing has a proper place in both government and private business when used within appropriate guidelines. Even the House of Representatives recognized the significant need for private sector use of polygraphs by child care institutions, public utilities, security services, and drug companies.

Food retailing and wholesaling involves the distribution of food and grocery products, including drugs that necessitate the utmost of consumer confidence. The polygraph test serves as a tool which enables food retailers and wholesalers to maintain this confidence level. The private sector exceptions in S. 1815 and amendments adopted in the House only serve to illustrate the irrationalities of S. 1815 in not permitting all employers in the private sector the use of polygraphs. To pick and choose one industry over another discriminates between industries when the polygraph is of importance to all in preventing internal theft and promoting public safety.

Recommendations and Conclusion. The National Grocers Association strongly believes that polygraph testing is a legitimate tool for pre-employment screening and investigations of internal theft. N.G.A. opposes the total prohibition on private sector polygraph use proposed in S. 1815. State regulations have struck a reasonable balance between the rights of current employees and the rights of employers, prescribing guidelines and standards for polygraph examiners. However, should Congress deem it necessary to proceed to establish federal uniformity on polygraph use, N.G.A. recommends passage of amendments to S. 1815 that would: 1. establish minimum standards for the use of polygraph tests in employment; 2. provide for the certification of polygraph examiners; 3. set minimum standards for polygraph examiners; and 4. provide relief for improper use of polygraphs.

The rights of prospective and present employees could be protected by making examinations voluntary, prohibiting the use of polygraph tests as the sole standard for determining employment status, and providing examinees access to polygraph results. In addition, polygraph examiners should be restricted from inquiring into religious beliefs or affiliations, beliefs or opinions regarding racial matters, and other protected subject matter. Only by striking a balanced approach will Congress protect the rights of employees and recognize the practical needs of American business in assuring consumers safe and reasonably priced merchandise. N.G.A. strongly recommends that the Senate Labor and Human Resources Committee amend S. 1815 to recognize the legitimate rights of private sector employers.

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# STATEMENT ON BEHALF OF THE NATIONAL RETAIL MERCHANTS ASSOCIATION CONCERNING THE PROPOSED PROHIBITION OF POLYGRAPH EXAMINATIONS BY PRIVATE EMPLOYERS

## Introduction

The following statement is submitted by the National Retail Merchants Association ("NRMA)", in response to legislation currently pending in the United States Senate which seeks to abolish the use of polygraph examinations by private employers. NRMA is a non-profit voluntary trade association of general merchandise and specialty stores throughout the United States. Included in NRMA's membership are all of the nationally known chain and department stores; the bulk of NRMA's membership, however, consists of small, locally-owned retail establishments throughout the nation. Togehter, NRMA's members operate approximately 40,000 department, chain, specialty and independent stores. They employ more than three million workers, and their annual sales exceed $150 billion.

NRMA submits this statement out of the concern of its members that Congress, in attempting to deal with certain perceived abuses arising out of the use of the polygraph, may overlook the legitimate and necessary function served by the polygraph in the

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retail industry. We believe, therefore, that before "throwing the baby out with the bathwater," Congress should look closely at the benefits currently provided to the public-at-large by the proper use of the polygraph, and at the likely adverse effects which would flow from a ban on the use of the polygraph by private employers.

## The Polygraph is a Necessary Tool of Business Today

The polygraph is used today in the retail industry for two primary purposes: (i) to reduce employee theft which raises the cost of goods and services to the consumer public and (ii) to reduce the risk of employment of criminal elements who may pose a danger to consumers.

Employee theft is a serious and widespread problem in America. The public suffers when the prices of goods and services are inflated due to losses attributable to employee theft. It has been estimated that American business loses $40 billion annually because of employee theft. In a recent National Institute of Justice survey, one-third of the retail, manufacturing and service employees questioned admitted to stealing company property. Fireman's Fund Insurance Company has estimated that employee theft causes one-third of all business failures. Of course, the American consumer has to pay more for goods and services as a result of increased costs due to employee theft. A ban on the use of polygraphs by private employers thus would be felt by all of us.

Specific instances involving application of polygraph examinations within the retail industry will serve to illustrate its importance -- both in reducing employee theft and in reducing risks to the public. For example, one large department store which inquired on its employment application about prior criminal convictions, hired an applicant for a television repairman position who had answered "no" to the question concerning convictions. The repairman was dispatched to a house where two young children were at home. The repairman sexually molested both children. Later investigation revealed that the repairman had prior convictions for sexual abuse.

Some retail stores use the polygraph in selected cases to verify responses given to questions on their employment application, but unfortunately, this particular store had not done so. Had the polygraph been used to verify the answers on this employee's application, the tragedy for these two children likely would have been avoided. A legislative prohibition upon the use of polygraphs as screening devices would increase the risk of similar tragedies.

At another large retailer, polygraph examinations are given only to applicants for positions in its trucking and warehousing operations. When the examinations were initiated, fifty percent of the applicants failed the exam. (The failure rate has since been reduced to thirty-three percent, presumably because the company's use of the polygraph as a screening device has become widely known.) What is especially significant here are the two most frequent reasons for applicant washout as revealed by the polygraph examinations administered by this retailer. The most frequent basis for rejection was that the polygraph revealed the applicant engaged in theft, undetected at the time, at a prior employer. The next most frequent basis for rejection of an applicant as revealed by the polygraph examinations was regular, on-the-job use or sale of illegal drugs. One of the reasons for asking applicants about drug use was the company's high accident rate in its trucking operations, and the concern that many accidents were caused by drivers with impaired faculties.

Polygraph examinations are a valuable tool not only in screening applicants for employment in the retail industry, but are highly useful in investigating internal theft. Frequently, employees themselves suggest they undergo polygraphing to remove themselves from suspicion, and employees often are exonerated through use of the polygraph. For example, at one large department store, three employees who worked in the cashier's office were suspected of stealing. Polygraphs cleared all three of suspicion. In another large department store, $30,000 of jewelry was discovered to be missing. The two employees who had direct access to the jewelry undertook polygraph examinations and likewise were cleared. And in yet another department store, security cases were found unlocked one morning and merchandise stolen. Suspecting an inside job, the company gave polygraph examinations to two janitors, the only employees present in the store at night. The examinations, which were administered to the two Spanish-speaking employees by a Spanish-speaking polygrapher, removed the employees from suspicion.

In many investigations of internal theft, polygraph examinations are used solely to verify information obtained through other sources. For example, faced with vast internal losses, one company conducted an undercover operation which brought to light a ring of thieves composed of dozens of employees. Polygraph examinations were administered to employees who had confessed so as to confirm the veracity of the confessions and ascertain the true loss caused by employee theft. In this instance, polygraphs were not used to identify the participants in the theft ring.

The public benefits from the use of polygraph examinations by private sector businesses other than retailers. Recent news stories concerning child abuse in day care centers underscore the need for better screening techniques by these agencies. Nuclear power plants and testing laboratories also have an especially great need to carefully screen their employees who have access to dangerous materials. Prohibiting the use of polygraphs in these areas, as S. 1815 does, will increase risks posed to the public in these fields.

## The Alleged Abuses of the Polygraph

Notwithstanding these compelling reasons for permitting private employers to continue to make appropriate use of polygraph examinations, there are still cries to abolish the use of the polygraph in American industry. The argument for doing so is most frequently based on perceived abuses in the use of polygraph examinations. Thus, it is frequently claimed that employees are questioned about their political affiliations, union activities, or religious beliefs. The proposed ban on the use of polygraph examinations clearly goes far beyond what is necessary to deal with such abuses, be they real or imagined. Indeed, existing legislation already is in place to deal with many such claimed abuses. For example, it is not necessary to ban the use of the polygraph to prevent inquiries about an employee's union sympathies. An adequate remedy already exists under Section 8(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C.§ 158(a)(1), which makes it unlawful for an employer to interrogate an employee for this purpose. In fact, the NLRB has found employers to have violated the NLRA where polygraphs were utilized to determine which employees were union adherants. Similarly, inquiries concerning religious affiliations run afoul of federal and state anti-discrimination laws.

Those who seek to ban the use of the polygraph also frequently complain about the failure of the company and/or the polygrapher to explain the polygraph procedure to the person being examined. Even if this were a pervasive practice, it should not be cause to totally ban the use of polygraphs. Rather, stricter regulations governing the use of the polygraph would control the abuses while preserving the polygraph as a legitimate and effective weapon to combat employee theft or other criminal activity.

It is also argued by some that polygraphs are not sufficiently accurate to permit their use by private employers. Advocates of a ban on the use of polygraphs in employment cite the fact that polygraph results are inadmissable in criminal trials. But this argument ignores the fact that in our criminal law system, conviction requires proof beyond a reasonable doubt. This is a much higher standard of proof than we apply even in civil litigation, let alone when we are dealing with discretionary decisions such as whether to hire a candidate for employment. Should retail employers need proof beyond a reasonable doubt before they choose not to hire a person who they have reason to believe is a drug dealer or a child molester? By forbidding the use of polygraphs, S. 1815 would force private employers to rely on more subjective criteria in hiring, reversing the direction toward the use of objective criteria taken by Congress in enacting the various anti-discrimination statutes. And the innocent who currently are absolved of wrongdoing by polygraphs would be compelled to dwell under a cloud of suspicion.

## Exemptions to the Anti-Polygraph Bills Illustrate the Usefulness of Polygraphs

The exemptions within S. 1815 for all governmental agencies and contractors of certain governmental agencies undermine the contention that polygraph examinations should be banned because of their alleged inaccuracy. By an overwhelming vote, the House of Representatives already has rejected the inaccuracy claim. On June 26, 1985, the House passed, by a vote of 333 to 71, a bill sponsored by Representatives Bill Young of Florida and William Dickinson of Alabama to amend the Department of Defense Authorization of 1986 so as to allow the Department of Defense to increase its use of polygraphs as a method of screening personnel with access to sensitive information. By this action, the House apparently overwhelmingly acknowledged the usefulness of the polygraph in protecting our national security. Yet, the same interests which make the polygraph a useful tool for protecting against theft of information make it a useful tool for protecting against theft of cash and merchandise.

Much of the evidence adduced during consideration of the Dickinson-Young amendment supports NRMA's view that the polygraph is extremely useful in investigating internal theft and screening employee candidates. John McMahon, Deputy Director of the CIA, stated in a letter to the House that "the polygraph is the most effective tool we have to identify and screen out individuals whose employment or affiliation could jeopardize our national security." Other individuals involved with national security were quoted as stating that the polygraph is an extremely useful tool. The effectiveness of the polygraph in the private sector was indicated by Representative Young who referred to a letter from the head of security for Days Inns, a motel chain, in which the writer stated that annual losses from employee theft were reduced from over $1 million to about $100,000 during the first year that polygraphs were used.

### NRMA's Position

It is NRMA's position that the benefits of polygraph use in the private sector are no less and the risks no greater than in the government. If abuses in the administration of polygraph examinations are shown, then Congress should address those abuses with remedial legislation such as standards for accreditation of polygraphers. An outright ban on the use of polygraph examinations by the private sector simply is not warranted, and conflicts with the policy considerations favoring its continued use in the public sector.

In sum, NRMA proposes that S. 1815 be rejected by this committee. Rejection of such proposed legislation would better serve the interests of the public-at-large by protecting the honest employee and the consumer.

# NATIONAL SMALL BUSINESS ASSOCIATION STATEMENT ON S 1618: THE POLYGRAPH PROTECTION ACT OF 1985

APRIL 23, 1986

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The National Small Business Association (NSB) appreciates the opportunity to present our views for the Committee Record.

We are compelled to conclude that S1618, the so-called Polygraph Protection Act of 1985, is a bad bill. And as a result, on behalf of our members, we urge its defeat.

In its present form, S 1618, is an unwarranted intrusion by the federal government into private sector personnel operations. The bill would deprive businesses one of their most useful tools in attracting and maintaining a quality and reliable workforce.

Proponents of the bill argue that Polygraph results are, at best, unreliable. Ironically, however, the bill would still allow polygraph use under certain circumstances such as public health, safety, and our nation's national security interests. If polygraph tests are so unreliable, then why does the bill allow them for any purpose?

The logic escapes us, too.

Contrary to what the proponents of this legislation say, polygraphs have not ruined anyone's life or career. A polygraph is nothing more than a medical instrument--it measures bodily functions such as breathing, heart-rate, and perspiration.

Properly administered polygraph tests when combined with other factors, can be very useful in revealing such important factors as heavy drug use, child molestation, and employee theft. This information is extremely important to employers who manufacture pharmaceuticals, operate child care centers, own jewelry stores, or handle depositor's money at a bank.

Our members understand that without the polygraph, their

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profits could be in jeopardy and they might be forced to pay even higher premiums for liability insurance. Therefore, the bill would have grave consequences if enacted.

We believe attention should be focused on the real issue in the use of polygraph tests: unscrupulous examinations and unprofessional examiners. One witness illustrated this point by comparing the polygraph to a scalpel. In the hands of a competent doctor, a scalpel is an indispensable surgeon's tool; in incompetent hands, it becomes the tool of a butcher.

Banning the polygraph, then, would deal a heavy blow to our nation's small business community, who, because of their unique characteristics such as small inventories and cash flow, would surely suffer. Congress and the federal government should be on the side of small business--not on its back. Congress could better demonstrate its sensitivity to small business, by focusing on how to improve the examinations--not ban them.

In this way, small business, consumers, the polygraph industry, public health and safety, our national security--everyone--would benefit.

Again, on behalf of our members, NSB appreciates this opportunity to submit our statement on this important small business issue.

# STATEMENT OF THE NATIONAL WHOLESALE DRUG ASSOCIATION

Mr. Chairman and Members of the Committee,

The NWDA is the national trade association of full-service drug wholesalers. It represents more than 90 percent of the drug wholesale industry by dollar volume. Its active membership is comprised of 100 drug wholesale corporations which operate more than 324 drug distribution centers nationwide.

Through these distribution centers, billions of dollars of controlled substances are distributed annually to drug stores, hospitals and medical facilities nationwide.

As a matter of public policy, our members believe they must maintain the tightest possible security measures, which include extensive background checks on employment applicants, pre-employment interviews and written tests, carefully supervised polygraphs by licensed examiners, as well as substantial physical security systems and programs to prevent the theft of controlled substances from drug warehouses.

It is no secret that drug abuse is a national epidemic with virtually no age, sex or race discrimination. The National Institute of Drug Abuse estimates that crime, lost productivity and medical expenses, resulting from drug abuse, cost our nation $49.6 billion annually. Given this backdrop of drug abuse, NWDA and its members believe that it makes no sense to say that keeping drug abusers and diverters out of drug distribution centers is the same as denying workers job opportunities. As an ancillary tool, the carefully regulated use of polygraph does help keep drug abusers and diverters out of distribution centers.

Rather than banning the use polygraph, we believe that employment opportunities can be better preserved through stronger regulation of its use and the establishment of strict standards and protections in the administration of polygraph examinations.

## INTRODUCTION

Most pharmaceuticals in the United States are distributed through drug wholesalers. In fact, 90 percent of all controlled substances, including dangerous narcotics, pass through drug wholesalers. Of the $12.5 billion of wholesale sales for 1984, it is estimated that $8.98 billion was in pharmaceutical products, $1.65 billion in proprietary products, $1.05 billion in toiletries and $840 million in sundry and miscellaneous goods.

This huge distribution network stretches across the United States, with drug wholesalers physically located in all but two states. Wholesalers select and purchase goods and store them in close proximity to the community and hospital pharmacy customer.

They perform a sorting function by concentrating, then dispersing goods in economic quantities and transporting them to pharmacies.

Drug wholesalers provide other marketing functions, including financing in the form of trade credit and value-added services. Among the value-added services provided by drug whoelsalers are price and shelf stickers, product movement reports, electronic order-entry, retail accounting services and pharmacy computer systems. Wholesalers usually offer daily ordering and delivery services.

The wholesaler's largest customer is the independent retail pharmacy. The independents represent more than 53 percent of the customer base. Nearly 20 percent of drug wholesalers' sales are to chain drug stores, 19 percent to hospitals. The balance is divided among chain drug warehouses, clinics, nursing homes, mass merchandisers and food stores.

On average in 1984, a drug wholesaler's operating expenses were a lean 6.84 percent, with gross margins of 9.39 percent and net margins a scant 1.42

percent. At this profit margin, a drug wholesaler must sell $70.42 in merchandise to recoup the cost of $1.00 in stolen goods.

Based on a 1985 survey, NWDA found that 80 percent of its members use polygraph examinations. The 20 percent who do not employ polygraph examinations are primarily located in lightly-populated rural areas where family-run businesses and close community ties preclude the need for polygraphs.

## DRUG ABUSE HARMS THE WORKPLACE

According to a 1982 survey (the most recent available) by the National Institute on Drug Abuse (NIDA), 21 million Americans used prescription drugs for non-medical purposes during 1982. This survey also estimates that nearly 25 million Americans experimented with illicit drugs during the same period.

According to DEA's Drug Abuse Warning Network (DAWN) statistics, the most heavily abused drugs are of legitimate origin. Of the top 20 drugs most frequently mentioned for 1980 through 1983, 15 were of a type normally found in the licit market, i.e. in drug wholesale warehouses, pharmacies and hospitals. These 15 drugs accounted for approximately 350,000 drug-related injuries and deaths from January 1980 to January 1982, while illicit drugs, such as heroin and cocaine, accounted for another 150,000 drug deaths and injuries. In terms of injuries and deaths, DAWN statisitcs clearly indicate that abuse of drugs of legitimate origin is at least equivalent to those of an illicit nature.

Mr. Ronald W. Buzzeo, deputy director for the Office of Diversion Control, Drug Enforcement Administration, recently discussed a report of drug abuse in the workplace /1/ at a meeting of the Institute of Nuclear Materials

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/1/ "Drug Abuse in The Workplace Employment Screening Techniques", International Drug Report, June, 1985

Management. In that report, he noted that as many as 6 million workers in the United States abuse drugs on a regular basis. He said that other studies show that as many as 3 to 5 percent of the employees in any medium to large-sized plant may be dependent on drugs as a way of life. Experts have also established 19 to 36 years of age as the median age range of employees under the influence of drugs. These are frightening statistics considering that many of the individuals go undetected until they are involved in a total or tragic accident. According to Mr. Buzzeo, the drug dependency of these people contributes significantly to the $80 billion price tag paid by the American economy as a result of lost productivity, absenteeism, poor quality control, injuries, ineffective supervision, destruction of property and thefts. Compared with the non-drug user, a drug user:

* is at least three times as likely to be involved in an accident;
* has better than two times as many absences lasting eight days or longer;
* receives at least three times the average level of sick benefits;
* is at least five times as likely to file a workers' compensation claim;
* is at least seven times as likely to be the target of garnishment proceedings; and,
* functions at about 65 percent of his/her work potential.

Employees who abuse drugs adversely affect the public health and safety. Injuries, pain and death inflicted on the American public by those who abuse drugs in the workplace must be minimized.

The drug distribution warehouse with fast-moving conveyor belt systems, forklifts and pallet lifting devices is no place for someone whose senses are impaired by drugs. Such a person is a danger to himself and others.

## DEA REPORTS EMPLOYEE THEFT OF CONTROLLED SUBSTANCES

In this country, any person or firm manufacturing, distributing or dispensing controlled substances, including dangerous narcotics, must register with the federal Drug Enforcement Adminstration (DEA) and comply with regulations to assure that controlled substances are not diverted from normal distribution channels. Among the literally thousands of controlled substances are amphetamines and barbiturates ("uppers and downers"), morphine derivatives and cocaine.

The regulations include specific, tight security measures. Despite these measures, employees still manage to circumvent the required controls.

For the period July 1982 through July 1983, total thefts reported to the DEA were 6,721. Nine percent were attributed to employee theft.

From January 1984 to March 1985, a total of 8,861 drug thefts were reported to DEA; 15 percent were attributed to employees. Thus, since 1983, the percentage of theft by employees has increased seven percentage points — nearly doubling their involvement.

The DEA estimates that each year employees steal one million dosage units of controlled substances from pharmacies.

Drug wholesalers take very seriously their legal responsibility to keep dangerous drugs from being diverted for illegal purposes. We know that the controlled substances diverted from our warehouses will be used to feed the habits of those already addicted and to expose others to drugs, many of whom will be young people. As ethical drug wholesalers, it is our goal to assure that our employees will not commit drug security breaches.

## WHAT DRUG WHOLESALERS DO TO MINIMIZE DRUG ABUSE AND DRUG DIVERSION

Drug wholesalers have found that the best way to provide a drug-free work environment and reduce diversion of controlled substances is to establish and implement standard employee screening procedures.

Among the measures used by most drug wholesalers are:

* extensive pre-employment interviews and written tests;
* thorough background checks with previous employers; and
* carefully supervised polygraphs by licensed examiners.

The Drug Enforcement Administration considers employee screening vital. Regulations state:

> "1301.90 Employee screening procedures. /2/
> It is the position of DEA that the obtaining of certain information by non-practioners is vital to fairly assess the likelihood of an employee committing a drug security breach. The need to know this information is a matter of business necessity, essential to overall controlled substance security. In this regard, it is believed that conviction of crimes and unauthorized use of controlled substances are activities that are proper subjects for inquiry. It is, therefore, assumed that the following questions will become a part of an employer's comprehensive employee screening program:
>
> Question. Within the past five years, have you been convicted of a felony, or within the past two years, of any misdemeanor or are you presently charged with committing a criminal offense? (Do not include any traffic violations, juvenile offenses or military convictions, except by general court-martial.) If the answer is yes, furnish details of conviction, offense, location, date and sentence.
>
> Question. In the past three years, have you ever knowingly used any narcotics, amphetamines or barbiturates, other than those prescribed to you by a physician? If the answer is yes, furnish details."

In a letter dated July 19, 1985, to NWDA, DEA has reaffirmed its position on the use of polygraph:

> "It has been DEA's experience that extreme care is necessary on the part of drug firms, both in hiring and monitoring employees who have routine access to controlled substances. These drugs command an illicit price which is many times their legitimate value, thereby creating an attractive temptation.

/2/ 21 Code of Federal Regulations 1301.90

The polygraph examination, utilized as one aspect of an employer's comprehensive employee screening, monitoring and investigatory programs for employees with routine access to controlled substances, has proven to be an effective means of determining criminal background, history of drug use and knowledge of or participation in the diversion of controlled substances. Information obtained as a result of the polygraph examination should be considered as but one part of an overall evaluation on the person's qualifications or continued employment.
DEA supports the use of the polygraph examination for pre-employment screening and as a subsequent investigatory tool in appropriate cases, provided that it is permitted by state and local laws. Those drug firms which utilize these procedures as part of their comprehensive program to minimize diversion are to be commended."

## HOW POLYGRAPH HELPS

The polygraph examination should be used as one phase of pre-employment screening and internal investigations. When used with other investigative measures previously mentioned, polygraph becomes a vital link in protecting our workplaces and in preventing drug diversion. Some examples may help.

1) A New England drug wholesaler reported that more than 430,000 doses of a very well-known tranquilizer had been stolen from its warehouse by several employees. The drug had been removed in small dosage units over a long period of time to prevent detection. Management eventually detected the loss but was unable to determine who was taking the drug. The state where the drug wholesaler is located had passed a law banning the use of polygraph by private industry. Although state police were exempted from the polygraph ban, their limited resources slowed the investigation. As a result, controlled substances continued to disappear. When finally administered, the polygraph exam detected a conspiracy including management, computer operations and warehousing.

Use of polygraph in pre-employment screening would probably have discovered that one of these guilty employees had lied on his application, as was determined during the investigation.

2) In another case, a salesman for a drug wholesaler was cleared of theft charges. A Georgia pharmacist claimed the salesman stole pills from several large pill bottles. In a verbal interview, the salesman denied the charge and volunteered to take a polygraph examination. The polygraph confirmed the salesman's innocence.

3) A third case, involving a Tennessee drug wholesaler, resulted in the termination of a truck driver who admitted stealing drugs because of pain from dental surgery. The driver first denied the allegations, then admitted taking the drugs when he failed a polygraph examination. He also revealed how he stole pills from so-called tamper-proof bottles. The packaging problem was reported to the manufacturer, who then took steps to prevent further pilferage.

4) A midwestern drug wholesaler reported that a total of $250,000 worth of prescription drugs were found to be missing during two annual inventories. The inventories indicated that small quantities of 20 drugs had been stolen over the two-year period. Management closely monitored their employees, but were unable to determine who was diverting the drugs; and, therefore, decided to polygraph all employees at the facility. The examinations indicated that a truck driver and a dockman were responsible. Following the examination, the two employees admitted to conspiring to steal the drugs. Since that time, the drug wholesaler has experienced no thefts.

5) In another case, a polygraph examination helped determine that a manager had stolen $60,000 worth of drugs. A drug wholesaler was experiencing a consistent shortage of three drugs. They were sure that an employee was stealing but were unable to determine who it was. All employees having access

to these drugs were polygraph. The results of the polygraph indicated that a manager, who had the authority to authorize shortages, was stealing. Following the examination, the manager admitted to the theft.

6) A drug wholesaler found a quarter ounce of cocaine missing from inventory. A search of the facility's trash uncovered the box in which the cocaine had been shipped. This was a clear indication that the cocaine had been stolen by an employee. After a preliminary investigation, management was unable to determine who in the facility had stolen the drug. As a last resort, all employees were polygraphed. The polygraph of the eighteenth employee (out of twenty) indicated he had stolen the cocaine. The employee then confessed. This employee was a relief-receiving clerk who worked three nights a week and was, therefore, one of the least likely suspects.

7) During 1984, one wholesaler administered more than 1,500 polygraph examinations to individuals applying for jobs in its drug distribution operations. About one in four applicants was not recommended for positions based on polygraph examinations in combination with other pre-employment screening tools. In 90 percent of the cases of those not recommended, the prospective employee admitted during the polygraph examination that he/she had lied on the employment application about a drug habit or criminal record.

## LICENSING REQUIREMENTS RATHER THAN POLYGRAPH BAN

Instead of banning this vital investigative tool now being used by the CIA, FBI, NSA and the Pentagon, we recommend that the Committee establish standards and protections in the administration of polygraph examinations.

We support legislation which would prohibit polygraph examiners from inquiring into an individual's religious beliefs, racial background, political or labor affiliations or sexual preferences. These questions are not relevant to the workplace environment or the tendency to commit drug security violations.

Any individual who takes a polygraph examination should be provided a copy of the result if he/she requests. We agree that the examination results should have very limited disclosure.

Further, we support requiring the polygraph examiner to provide the written questions to the individual before the examination and to obtain in writing the consent of the individual to participate in the examniation.

## SUMMARY

In summary, Mr. Chairman, S. 1815 has been cited as the "Polygraph Portection Act of 1985." Ironically, it does not protect drug-free employees who must work side by side with employees who abuse drugs. S. 1815 will, in our opinion, facilitate the entry of drug abusers into our distrubtion centers. Once they are in our distribution centers, S. 1815 will help them steal and divert narcotics and other controlled substances without detection. All of American society then suffers the terrible financial, physical and emotional harm caused by these diverted drugs as they feed addicts and expose others — among them young people -- to drugs for the first time.

The key to reducing theft and diversion of narcotics and other controlled substances from drug wholesalers as well as all DEA registrants is thorough screening and background checks on potential employees who may have access to controlled substances. Polygraph plays a vital role.

We hope that Congress will acknowledge the vital role polygraph examinations can play in protecting American society from drug abusers and diverters as it already has acknowledged its importance for the FBI, CIA, and Armed Forces, as well as state and local governments.

A ban on polygraph examinations for our industry would undermine the Federal government's aggressive campaign against drug addiction and abuse.

Rather than ban polygraph examinations, we hope you will consider enacting legislation that establishes certain standards and protections in the administration of polygraph examinations.

Thank you, Mr. Chairman, for this opportunity to state our concerns about such an important issue. We look forward to working with you and your Committee, as well as other members of the Senate to resolve this important issue.

NEW YORK CLEARING HOUSE

100 BROAD STREET, NEW YORK, N. Y. 10004

JOHN F. LEE
EXECUTIVE VICE PRESIDENT

April 22, 1986

Honorable Orrin G. Hatch
Chairman
Senate Committee on Labor
and Human Resources
428 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Hatch:

The New York Clearing House Association (the "Clearing House"), an association of twelve leading commercial banks located in New York City,* is writing to express its concern with the Employee Polygraph Protection Act of 1986 (H.R. 1524) and the Polygraph Protection Act of 1985 (S. 1815), both of which would prohibit the use of polygraphs by most private employers, including financial institutions. The Clearing House strongly urges the Senate Labor and Human Resources Committee to amend this legislation to exempt banks and other federally regulated financial institutions from any such ban against the use of polygraphs.

Although the Clearing House shares Congress' concern that polygraphs may be abused if administered indiscriminately or unprofessionally, we note that Congress also has recognized certain situations in which the need to use the polygraph outweighed this interest and therefore exempted certain employers from the proposed ban. S. 1815 thus permits the polygraphing of government employees and certain Defense Department personnel. H.R. 1524 contains additional exemptions for government intelligence agencies, the pharmaceutical industry, day care centers and nursing homes, and certain security service providers.

Society's interest in secure and well managed financial institutions is equally compelling. Because the very nature of their business makes them vulnerable to internal theft, security is a matter of paramount concern to banks and other financial institutions. It is important that financial institutions remain able to use every legitimate means to identify dishonest employees and to deter potential criminal activity. The integrity of the nation's financial system weighs heavily in favor of permitting federally regulated financial institutions to use the polygraph in an objective and professional manner. Whatever the merits of prohibiting the use of polygraphs by employers generally, its blanket application to financial institutions is ill-advised. We respectfully urge that Congress exempt federally regulated financial institutions from this ban.

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* The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Manufacturers Hanover Trust Company, Irving Trust Company, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA and European American Bank.

Internal employee theft is the most significant factor in crime related losses suffered by financial institutions.

Although the overwhelming majority of employees are trustworthy, financial institutions nonetheless suffer significant financial losses as a result of criminal acts committed by their employees. Contrary to the popular belief that most crime related losses are due to bank robberies, Federal Bureau of Investigation ("FBI") statistics for the past few years indicate that most losses are due to acts of internal theft.

According to the FBI, losses to financial institutions stemming from fraud and embezzlement totalled more than $282 million in 1983. (Federal Bureau of Investigation, Bank Crime Statistics [on] Federally Insured Financial Institutions, January 1, 1983 to December 31, 1983). These losses mounted to $382 million in 1984, (Federal Bureau of Investigation, Bank Crime Statistics [on] Federally Insured Financial Institutions, January 1, 1984 to December 31, 1984), and there is no reason to believe that they will not continue to rise. In each of these years, more than 80% of these incidents were attributed to internal sources. In contrast, it is worth noting that while losses from internal theft have climbed steadily, losses from bank robberies, burglaries, and external larcenies have remained at a relatively stable level of $40 to $42 million, a fraction of the losses due to fraud and embezzlement.

Banks are also particularly vulnerable to certain types of criminal activity which require the cooperation of co-workers and the complicity of employees and persons over whom the institutions have no control. The potential for the laundering of money obtained illegally, primarily through organized crime's drug trafficking and gambling activities, is one such example which has attracted recent public attention. In addition to thwarting internal investigations, prohibiting banks from polygraphing employees reasonably suspected of involvement in money laundering would greatly restrict the ability to identify persons initiating the schemes from outside the bank.

Additionally, as banks have widened the range of services they provide to their customers, the scope of opportunity to commit crimes against banks has increased significantly. Crimes unheard of before the advent of sophisticated telecommunications and computer technology, such as unauthorized electronic funds transfers by a bank employee to his own or a partner's account and the fraudulent use of automated teller machines and point of sale terminals, are becoming sources of financial loss. Millions of dollars can be diverted in an instant if the confidentiality of computer codes is compromised. Dishonest employees can also tamper with sensitive customer information stored in banks' electronic data bases, often leaving no trace of such activity.* When added to the more "traditional" acts of dishonesty, such as credit card fraud, the manipulation of customer records, and the forgery and alteration of checks and securities, the potential for employee fraud is indeed great.

Prohibiting banks from using the polygraph as an effective investigative tool at a time when the scope of criminal opportunity is broadening and the magnitude of losses from fraud and embezzlement is increasing dramatically would significantly limit our ability to search out the truth in the investigation of acts of wrongdoing. Such a ban would also destroy a powerful deterrent to criminal behavior and would thus further increase the potential for misappropriation of customer's funds.

Financial institutions have statutory duties to guard against wrongdoing.

As the depositories of the nation's savings, and the system through which commercial and consumer transactions flow, financial institutions have a special responsibility to their customers and to the public above and beyond those of other businesses. For financial institutions security is a responsibility mandated by law.

For instance, under Section 19 of the Federal Deposit Insurance Act banks which hold federally insured deposits may not employ, in any capacity, persons convicted of "any criminal offense involving dishonesty or a breach of trust" without first obtaining the written approval of the FDIC. 12 U.S.C. § 1829.

Additionally, in the Bank Protection Act of 1968 (12 U.S.C. §1881 et seq.) Congress directed each federal banking supervisory agency to develop standards for bank security systems. The Board of

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* See generally, American Institute of Certified Public Accountants, Report on the Study of EDP-Related Fraud in Banking and Insurance Industries (1984).

Governors of the Federal Reserve System, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Federal Home Loan Bank Board have all promulgated such regulations. (12 C.F.R. §§216, 21, 326, and 563a (1985), respectively.) Their concern for bank security is illustrated by the requirement that the board of directors of each bank appoint and supervise its bank's chief security officer. Such officers are charged with the development and administration of security programs which equal or exceed the minimum standards contained in the regulations.

Financial institutions are also required to investigate and report suspected acts of wrongdoing to their federal supervisory agency and to law enforcement agencies. Commercial banks, for example, must investigate suspected thefts, embezzlement, defalcations involving bank funds or personnel, certain mysterious disappearances or unexplained shortages of bank funds or assets, and any suspected violation of state or federal law involving bank affairs, and must report the details of such occurrences to the Federal Reserve, Comptroller of the Currency, or the FDIC and also to the FBI and other law enforcement agencies. (12 C.F.R. §§216, 7 and 21, and 353 (1985), respectively.) Similar duties are imposed by banking regulators in many states. The report of such a loss and its investigation is generally required to be filed promptly. For example, the State of New York requires the filing of a report immediately upon the discovery of events involving the taking, or attempted taking, of money or property. (N.Y. Banking Superintendent's Regulations, §300.1)

Maintenance of the public's trust in financial institutions compels the investigation and rapid resolution of any wrongful acts which may interfere with the institutions' ability to safeguard their customers' property. Failure to control such acts leads to the erosion of the public's confidence in the ability of financial institutions to ensure the safe and efficient flow of funds and to safeguard the dollars, securities and other valuables entrusted to them.

Wrongful acts suspected to have been committed by employees of financial institutions at all levels thus must be investigated promptly and thoroughly. Used responsibly, the polygraph is a useful investigative technique which protects the innocent in addition to identifying dishonest employees. It has been the experience of our members that the polygraph can be used effectively without abusing the privacy of the persons involved. Forbidding financial institutions the continued prudent use of the polygraph would inhibit their ability to investigate and resolve internal crimes, and would create the added harm of removing a potent deterrent to future criminal activity.

When you introduced S. 1815, you noted that "the bill does recognize that the use of polygraph tests may have a limited role where they are administered in an objective, professional and complete manner." (Cong. Rec., daily ed., October 31, 1985, S 14553). You also noted that the development of legislation to protect workers should also address the concerns of those employers who need to use the polygraph in "ascertaining the veracity of employment applications...or rooting out crime in [the] workforce." Id.

Financial institutions, a mainstay of America's economic system, must be secure in the knowledge that they can protect against wrongdoing by their employees. The Clearing House strongly believes that the availability of the polygraph to our nation's financial institutions should be maintained. We respectfully request that the Senate Labor and Human Resources Committee amend S. 1815 to exempt federally regulated financial institutions, allowing them to continue their responsible use of the polygraph.

Very truly yours,

John F. Lee

RECEIVED APR 24 1986

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CARSON CITY 89710

BRIAN McKAY
ATTORNEY GENERAL

WILLIAM E. ISAEFF
CHIEF DEPUTY ATTORNEY GENERAL

April 21, 1986

James E. Ritchie, Esq.
Suite 400
499 South Capitol Street, S.W.
Washington, D.C. 20003

Re: Federal Polygraph Legislation

Dear Jim:

I have been monitoring the action of Congress in connection with H.R. 1524 and S. 1815. As you may know, I act as chairman of the Nevada State Private Investigator's Licensing Board, which licenses polygraph examiners in Nevada. In that capacity, I am familiar with the impact this legislation will have on the administration of polygraph examinations in the private sector, as well as with the respective concerns existing on all sides of this issue.

I would like to submit a written statement to the Senate Committee on Labor and Human Resources in connection with its consideration of S. 1815. David Johnson informs me that you have offered the services of your office to assist us in directing this material to the appropriate channels for filing with the Committee. Accordingly, enclosed with this correspondence you will find an original and one copy of the written testimony which I would like to offer.

Thank you for your courtesy in connection with this matter. If there is anything further that is necessary from us in order to ensure that these materials are appropriately filed, please contact me or David Johnson at your convenience.

Very truly yours,

Brian McKay

BRIAN McKAY
Attorney General

BM/DDJ:ck

Enclosures

Senator Hatch and other members of this committee:

I am offering this testimony for your consideration in connection with Senate Bill 1815. I am Brian McKay, Attorney General of the State of Nevada. I serve as Chairman of the Nevada State Private Investigator's Licensing Board, which licenses polygraphic examiners in Nevada. In that capacity, I have become familiar with the controversy surrounding polygraphic examinations, as well as with those procedures and policies that may be implemented to ensure the integrity of the polygraphic examination, the instrument, and the examiner. Certainly the polygraphic instrument and the method in which the polygraphic test is administered is a controversial matter. I understand that in the Congressional Record on Wednesday, March 12, 1986, the polygraph was referred to as an unreliable tool, a voodoo craft, and was compared to dunking stools and firing squads. I disagree with these allegations. In my experience, when properly administered in strict compliance with stringent guidelines and controls, the polygraph can be a useful and effective technique for detecting criminal or other undesirable activity. In order to achieve this useful purpose, however, strict policies and procedures must be implemented not only to license but to regulate the polygraph examiner, his instrument, and the manner in which the polygraph examination is given.

In Nevada, for example, all polygraph examiners, with the exception of those employed by governmental agencies, must be licensed. This is so whether those polygraph examiners are independent contractors or act as employees of private businesses.

Strict criteria are utilized to grant or deny applicants for a polygraph examiner's license. Polygraph examiners must be of good moral character and of temperate habits and must not have been convicted of felonies, crimes of moral turpitude, or crimes involving illegal possession of dangerous weapons. A polygraph license may be denied to any person who has committed any act of dishonesty or fraud, or who has demonstrated untruthfulness or a lack of integrity. Applicants must have successfully completed at least 250 polygraphic examinations, including at least 100 examinations concerning specific inquiries as distinguished from general examinations for the purposes of screening, and must also have been actively engaged in conducting polygraph examinations for at least two years prior to applying for a license. They must have also completed at least 24 hours of advanced polygraphic training acceptable to the licensing board during the two years immediately preceding the date of the application.

After licensing, polygraph examiners are strictly regulated and controlled to ensure that the manner in which they conduct examinations strictly complies with the guidelines established by the licensing board. Those guidelines deal not only with the manner in which the examiner conducts the polygraphic exam, but also with the condition, accuracy, and reliability of the instrument utilized in connection with the examination.

In Nevada, by statute, an individual undergoing a polygraphic examination may refuse to answer any question which would either be incriminating or which would be deemed to be degrading. Nor may a polygraph examiner make inquiry into the religion, political affiliations, labor organization affilation, or sexual activities of any person examined, unless such inquiries are made at the request of the person being examined.

In my judgment, if all the foregoing procedures and policies are strictly complied with and enforced, the polygraphic examination can provide a fair and effective investigative tool for government and private industry. In Nevada, the gaming industry often makes use of the polygraph in connection with investigations into criminal activity. The gaming industry is a strictly regulated industry, whose legitimacy and credibility in the marketplace can be maintained only if the public is assured that gambling is conducted fairly and without any taint of criminal involvement. The casino industry is a business whose inventory is cash. Because of this it is understandable and legitimate for casino employers to strictly scrutinize the activity of their employees, especially those in cash-handling positions. Properly used, the polygraph can provide such employers with an effective technique to detect criminal activity on the part of employees. Such employers should not be denied access to that tool without careful reflection on the part of Congress.

Thank you for affording me the opportunity to address you.

Brian McKay
Attorney General of Nevada

## STATEMENT OF ROBERT M. RUSSELL, ORKIN PEST CONTROL

I am Robert M. Russell of Orkin Pest Control, a division of Rollins, Inc. Orkin is the world's largest in structural pest control. We operate in 43 states in this country; we employ 5,000 people; we serve over a million customers. We offer these comments for our company, for all other conscientious users of pesticides, and on behalf of our employees and customers.

Structural pest control, as opposed to agricultural pest control, is a service industry. Our service is conducted in both commercial structures and in residential buildings. We help protect the food, the fiber, the structures, and even the health of our nation. To render this service, and as with most service industries, we send a trained technician to the customers' premises. As we are dealing with household insects and wood-destroying insects and organisms, our control procedures are of necessity carried out inside the homes and buildings of our customers.

Control of pests necessitates the use of pesticides. These chemical and botanical substances are safe to both our technicians and to others who might be exposed when label instructions are followed. Application is governed by both federal and state laws. Some of these materials, however, can be hazardous and even toxic should accidents occur or should a misapplication take place.

Because our technicians are sent into all areas of our customers' homes, and because they are using potentially harmful materials, we feel that we must protect our customers in every way possible and insure that our employees meet the highest standards of both integrity and morality. To assist us in assuring that our prospective employees are totally qualified, we use polygraph where it is legal to do so. The importance of polygraph to our industry cannot be overemphasized. While most industries are concerned about the potential impact of poor hires on their own business, our industry must be most concerned with the impact of poor hiring decisions on our customers. It would be catastrophic for us to put felons, drug addicts or others in our customers' or potential customers' homes.

We are well aware that the polygraph is not a perfect instrument. It is, however, effective in most cases and has helped us to prevent some horrible mistakes. An applicant can present himself or herself with appeal. After all, are not the con people some of the most believable in the world? And there are ways and means to cover or circumvent background checks. But the polygraph, for all its unpopularity, looks through the personally appealing person with the bogus references to see the potentially dangerous person who might harm our customers.

In structural pest control, our position is unique. Our technicians are in the homes and using potentially harmful chemicals. We owe it to our customers and prospects to use every means at our disposal, perfect or imperfect, before we place our people in our customers' homes and businesses.

Senate Bill 1815 would deprive our customers of this protection.

We think the human rights of our customers deserve the first consideration. For these reasons we oppose this legislation. If this legislation goes forward, we request that our structural pest control industry receive the same exception as has been granted to the Defense Department and the drug industries. The circumstances are the same.

Thank you for your consideration in this matter.

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April 22, 1986

The Honorable Orrin G. Hatch, Chairman
Committee on Labor and Human Resources
United States Senate
Dirksen Senate Office Building
Washington, D.C. 20510

Re: Polygraph Examinations

Dear Senator Hatch,

I hope that the remarks that follow will be included in the Committee's record pertaining to the use of polygraph examinations.

Several years ago, in the process of preparing a tort action against an employer and the polygraph examiners it had hired to periodically screen employees, I became quite familiar with the testing procedures and employment applications. Polygraph experts boast that the accuracy rate of their testing is between 80 to 90%. My concern is for the 10 to 20% of the 500,000 to 3 million people tested annually in this country whose reputations are tainted or whose careers are ruined by the test's margin of error.

Many of those who test employees or applicants for employment with the polygraph admit that the power of the instrument lies in its propensity for eliciting admissions. Employers are willing to invest millions each year to access admissions and they believe strongly in the deterrent value of periodic testing. In America, where the individual's due process rights are guaranteed by the Constitution and one is innocent until proven guilty, examinees are required to prove innocense when there has been no indictment or trial and there is not a shred of legally admissable evidence pointing a finger at them.

I support any measure which will control the use of this

Orwellian instrument and stem the harm visited on thousands of Americans each year by a test whose validity is so questionable.

Sincerely yours,

Willafay McKenna

Willafay McKenna,
Attorney-at-Law

## STATEMENT OF THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA

The Petroleum Marketers Association of America (PMAA) is the national organization representing the nation's independent petroleum marketers. PMAA is a federation of state and regional trade associations from the 48 continental states and the District of Columbia. A listing of our member associations is included as Attachment 1.

PMAA member associations represent some 11,000 independent petroleum marketers, including gasoline and diesel fuel wholesalers, commissioned distributors of gasoline, gasoline reseller-retailers and thousands of retail fuel oil dealers, as well as independent marketers serving the industry by storing and supplying petroleum products. Collectively those marketers account for nearly 50 percent of the gasoline and 75 percent of the home heating oil sold in the United States. They sell their product under either their own private brand or the trademark of their supplier.

PMAA's gasoline marketers are also heavily involved in combination gasoline/convenience store operations. PMAA marketer-members own over 14,000 convenience stores.

PMAA's heating oil marketers are also involved in diversified operations, including the sales and servicing of heating oil equipment. Additionally, many heating oil dealers have become involved in the sales and servicing of combination solar/oil heat systems.

The majority of PMAA marketers are small businessmen, serving homes, farms, businesses and industry. When Small Business Administration guidelines are applied to the PMAA membership, the majority of marketers fall within SBA jurisdiction. PMAA thus represents the small business segment of the petroleum marketing industry. Our member companies employ approximately 250,000 people nationwide.

### Points in Opposition to S. 1815

As is the case with many industries, petroleum marketers are involved with the wholesale and retail sale of goods and services to their customers. The interest these marketers have in the polygraph issue stems from two aspects. First, many of our members own and operate convenience stores in conjunction with their service stations. Many are operated on a 24-hour basis, and most will have only one employee in the store at any given time.

Petroleum marketing is generally a high volume-low margin industry. According to data compiled by PMAA, the average gasoline marketer's net income after taxes in 1984 was less than one half cent on each dollar of sales. As a result, marketers are very cost and security conscious in the operation of their businesses. They cannot afford inventory shrinkage or other losses which may be associated with employee dishonesty.

Polygraphs have proven to be an excellent way to not only identify dishonest employees, but also to protect the honest, hardworking individuals within the company. This advantage from the employee's perspective is often overlooked, but is a factor that should be taken into consideration. This also keeps marketer's cost down and therefore, consumer prices.

The second area of a marketers business for which polygraphs would be useful relates to the transportation of petroleum products. Many of PMAA's members operate their own trucks (also called transports). Generally speaking, each of the transports has the capacity to haul approximately 9,000 gallons of gasoline. As a safety precaution, many of our members utilize polygraphs to examine their drivers. Such examination serves as a deterent and has resulted in several cases of drivers being disciplined because of drug or alcohol use. Such drug or alcohol use obviously impairs the ability of drivers, and such an impairment can have obvious adverse safety consequences in connection with those 9,000 gallon transports.

Transportation of the products is strictly regulated by the state and federal governments and marketers are under enormous responsibility to ensure that their drivers not only have safe driving records,but also do not have a history of alcoholism or drug abuse.

Hauling gasoline presents the same kind of dangers as hauling other volatile or hazardous materials. Whether it is our industry or any number of others, the option of administering polygraph examinations to drivers would seem to us to be a reasonably prudent approach to not only prevent hiring unsafe drivers, but to also to identify drivers who during the course of employment may develop an alcohol or drug problem. The prohibition of the use of polygraph examinations in the case of drivers of vehicles hauling hazardous materials could increase safety risks to the public.

As a general conclusion, PMAA is particularly concerned about the potentially hypocritical approach taken by pending polygraph legislation. If polygraphs are indeed not reliable as some argue then why are they justified for government employees? Why should some industries be exempted as is done in the House passed bill?

Either polygraphs are reliable or they are not. We know of no logical way to argue that polygraph utilization is acceptable for governmental and selected private sector categories, but not for the remaining private sector categories. PMAA does not oppose uniform standards for exams and examiners, and we believe that this will represent a far more equitable approach than Congress carving out selected exemptions based on nebulous criteria.

## Recommendations

Legitimate questions can be raised regarding past polygraph reliability and examination procedure. Therefore, we would support a limited federal response which would address these issues, but retain the polygraph option. Specifically, PMAA strongly supports the enactment of legislation along the lines of H.R. 3916, a bill introduced on December 11, 1985, by Representatives Bill Young (R-FL) and Buddy Darden (D-GA). The Young-Darden legislation represents a reasonable approach and includes the following provisions.

o a polygraph examinees' bill of rights which requires full disclosure to the examinee of his rights under this Act, authorizes the examinee to receive copies of opinions and conclusions reached by the examiner, and requires examinations to be conducted on a voluntary basis.

- comprehensive federal standards for polygraph examiners and examinations that insure that each examiner is properly qualified, asks no questions concerning a person's religion, sexual preferences, union activities and other matters inappropriate in the employment context, and specifies the types of conclusions that the examiner is permitted to make.
- prohibition against an employer making a personnel decision based solely on conclusions reached or opinions made by an examiner.
- prohibition against any attempt to waive an individual's rights under this Act.
- imposition of fines up to $10,000 against any person who violates this Act and authorization for victims to seek full relief in federal district court if such relief is not available in state court.
- imposition of a continuing education requirement.
- requirement that each state or other political subdivision desiring to administer a regulatory program certify to the Secretary of Labor that it has adopted an administrative plan meeting the standards of the Act.

PMAA strongly opposes the approach taken by S. 1815 and by the House-passed bill, H.R. 1524. PMAA has not attempted to have an exemption carved out for our members because we believe that whole approach is totally hypocritical. We urge the Senate Committee to report legislation similar to H.R. 3916.

## Conclusion

PMAA believes that polygraphs, administered properly, have an important role in our society. In the petroleum marketing industry, they help reduce marketer costs, and thus, consumer prices. They also help ensure that petroleum products are transported in a manner which ensures public safety. Finally, they protect employees, who through the use of the polygraph, can establish clearly their innocence.

PMAA supports appropriate restrictions on the use of the polygraph as outlined above, but does not believe an outright ban is in the public interest. Thank you, and we will be happy to answer any questions you may have.

ATTACHMENT 1

## MEMBERS OF THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA

The Petroleum Marketers Association of America represents the independent petroleum marketers who are members of these state and regional trade associations:

Alabama Oilmen's Association
Arizona Petroleum Marketers Association
Arkansas Oil Marketers Association, Inc.
California Independent Oil Marketers Association
Colorado Petroleum Marketers Association
Independent Connecticut Petroleum Association
Florida Petroleum Marketers Association
Georgia Oilmen's Association
Idaho Oil Marketers Association
Illinois Petroleum Marketers Association
Indiana Oil Marketers Association, Inc.
Petroleum Marketers of Iowa
Kansas Oil Marketers Association
Kentucky Petroleum Marketers Association
Louisiana Oil Marketers Association
Michigan Petroleum Association
Mid-Atlantic Petroleum Distributors Association, Inc.
Mississippi Petroleum Marketers Association
Missouri Oil Jobbers Association
Montana Chapter, Western Petroleum Marketers Association
Nebraska Petroleum Marketers, Inc.
Independent Oilmen's Association of New England
Fuel Merchants Association of New Jersey
New Mexico Petroleum Marketers Association
Empire State Petroleum Association
North Carolina Petroleum Marketers Association
Northwest Petroleum Association
Ohio Petroleum Marketers Association
Oklahoma Oil Marketers Association
Oregon Petroleum Marketers Association
Pennsylvania Petroleum Association, Inc.
South Carolina Oil Jobbers Association
South Dakota Petroleum Marketers Association
Tennessee Oil Marketers Association
Texas Oil Marketers Association
Virginia Petroleum Jobbers Association
Washington Petroleum Marketers Association
Western Petroleum Marketers Association
West Virginia Petroleum Marketers Association
Oil Jobbers of Wisconsin, Inc.
Wyoming Petroleum Marketers Association

The Petroleum Marketers Association of America is located at 1120 Vermont Avenue, N.W., Suite 1130, Washington, D.C. 20005. Telephone (202) 331-1198.

POLYGRAPH PERSONNEL RESEARCH INC.
LABORATORY AND SCHOOL FOR LIE DETECTION
400 Lafayette Building, 5th and Chestnut Sts.
Philadelphia, Pennsylvania 19106
(215) 928-1821
800-523-1565

**SILVESTRO F. REALI**, *President*

April 23, 1986

Senator Orrin G. Hatch
United States Senate
Committee On Labor And Human Relations
Washington, D.C. 20510

RE: Polygraph Testing

Dear Senator Hatch:

Allow me to express my appreciation for the opportunity to include my comments on polygraph to your committee. I do so on behalf of my peers, my graduates, The Pennsylvania Polygraph Examiners Association and The American Society of Polygraph Practioners, of which I am president.

I have been a polygraphist, both as a public servant in the Philadelphia Police Department and a private practioner since 1968. I instituted the Polygraph Personnel Research School for Lie Detection in 1973. I am the originator of the Positive Control Polygraph Technique; and currently associated with Professor Clarke Mc Cauley at Bryn Mawr College doing research on polygraph.

I have been accepted as an expert in the Federal, State and Local Courts. I have consulted for law enforcement agencies in Federal, State and Local Government.

Let me state at the outset that polygraph as an industry has made a large contribution to our Nation's security, economy and labor force.

## NATIONAL SECURITY

Polygraph has been used for the security of our Nation since the late nineteen thirties. It has been used in every governmental department for securing the safety of our presidents.

Its use in law enforcement is unparalleled in exonerating the innocent and detecting the guilty. It is an invaluable aid to law and order.

## NATIONAL ECONOMY

Polygraph has been used in the commercial sector since the nineteen thirties. Its effect on theft in the market place is responsible for the salvtion of many businesses, large and small. This not only benefitted the business owner; it also benefitted the consumer as well because the consumer pays for the businessman's losses through increased costs of goods sold.

## LABOR FORCE

Polygraph has always been considered to be anti labor. On the contrary, it is pro labor. It has always protected the honest employee by exposing the dishonest employees thereby enhancing his (honest employee) reputation in the eyes of the employer.

No other industry which contributed to our national well being has ever undergone such scientific and social scrutiny before it was accepted and regulated as has the polygraph industry. Sixty-five years have passed since Dr. John Larson used polygraph at the Berkley Police Department to detect crime.

Since that time some of the most preeminent researchists in the field of psychophysiology have proven time and again that polygraph is valid.

In the recent debate on House Bill 1524 polygraph was described as "voodoo". Is it voodoo that those responsible for our national security practice? Is it voodoo that is taught at the Federal Institute of Polygraph at Fort Mc Clellan in Alabama? If it is then our country is in extreme danger because we are entrusting our Nation's security to Witch Doctors.

I submit Mr. Charimanm and Gentlemen of The Committee, that when polygraph is properly practiced it makes a great contribution to our society. "IT IS NOT VOODOO".

House Bill 1524 was, in its original form, intended to obliterate polygraph. By the time the bill was finalized and passed, the bill exempted Federal, State and Local governments from any restrictions. It also exempted the employees in the pharmaceutical industry, armored car guards, and those employees in the health services industry working in homes for the aged and day care centers.

This is an admission by the Congress that polygraph is valid and usefull in our society. I admire the Congress for its concern for the illegal use of drugs through theft, for the well being of our aged and children, and for the money from our market places. I believe these amendments were necessary.

But, I ask, is the money in the banks any less important before it gets into the armored car? Is this not the same money that originated from the store or bank? Doesn't that money deserve the same protection at its point of origination.

Congress allowed use of polygraph for the protection of our aged and children. It is protecting our nations past and future, but it is neglecting our present protection--THE PROTECTION OF OUR NATIONAL ECONOMY.

According to studies made on employee theft in the workplace a conservative estimate of 30 billion dollars is lost through employee therft each year. The economic effect to our economy is enormous. It raises the consumer's costs approximately 15% for the goods bought. It reduces investment capital, and affects our national tax receipts.

The same people responsbile for these thefts are also responsible for the discord that evolves between management and employees because the theft endangers managerial suspicion of all employees, even the good employee. This then affects the good employee's productivity.

I can tell you from my own experiences that a sigh of relief is given by both the employee and employer when the innocent are exonerated because the pall of suspicion has been lifted.

I can also tell you from experience that many small businesses would have disappeared were it not for the efforts of polygraph. Many large businesses would be seriously damaged were it not for the efforts of polygraph.

Most people are told that polygraph is an exclusionary device. Its primary function is to keep people from obtaining employment. This premise is ridiculous. Polygraph is intended to assist employers employ people. People the employer doesn't even know and yet is expected to entrust his business affairs with. It is intended to relocate people according to their degree of responsibility. It is intended to make both the employer and employee aware of their responsibilities.

I am sure you have heard the socalled horror stories told and retold by our detractors to berate and degrade our industry. Were I to say that errors are never made in polygraph I would certainly be lying. But I can honestly state that the errors made are no more in number or any more serious than those committed in any profession or industry. Because medical doctors, or nuclear energy plants have made errors, ahould we eliminate them from our society? Certainly not. We regulate them.

The passage of the Anti-Polygraph bill will cause unemployment of some twenty thousand or more citizens in the polygraph field and its related industries. This would be another one of the effects on our economy, not to mention the increase in employee theft when left unbridled.

I submit that 65 years of study, research and practice should be sufficient for recognition and regulation. The nuclear energy industry has been in existence one third the time that polygraph has, and yet it is recognized despite its problems and regulations.

I am asking the Committee to consider the alternative of regulation rather than elimination. It is time.

I therefore ask the Committee not to consider Senate Bill 1818; and to submit this position statement into the Committee's hearings.

Very truly yours,

Silvestro F Reali

Silvestro F. Reali
President

SFR/mr

ROLLINS

Executive Offices

April 29, 1986

The Honorable Orrin G. Hatch
Chairman
Committee on Labor and Human Resources
Washington, D.C. 20510

Dear Mr. Chairman:

As President and Chief Operating Officer of Rollins, Inc. (ROLLINS), a New York Stock Exchange listed consumer service company, I oppose the "Polygraph Protection Act of 1985," S.1815, now before your Committee. As currently drafted, this legislation would preclude ROLLINS and other home service companies from utilizing the polygraph with other character analyzing tools to protect our customers from employees who would be in a position to use their employment for criminal purposes.

ROLLINS has two primary business operations: Rollins Protective Services and Orkin Pest Control. Rollins Protective Services is the largest in-home security system company in the country, operating in 27 states and the District of Columbia. Orkin is the world's largest structural pest control company, servicing more than a million residential and commercial customers in 45 states.

Annually Orkin and Rollins Protective Services together send thousands of technicians and sales representatives into more than two million private residences throughout the country. The almost unlimited access provided our employees could result in direct threats to the health and well being of our customers, their families and guests by employees with criminal motives. In the case of Rollins Protective Services, if criminally motivated, technicians installing our security systems could also take advantage of their knowledge of the system to undermine its effectiveness.

Each time our technicians are granted access to private residences, our customers place their trust in our company's judgment as to the character of these employees. An average citizen who would not consider allowing strangers access to their home is willing to do so if that stranger identifies himself or herself as an Orkin or Rollins Protective Services employee. We are proud of the fact that we have earned that trust through the years. We recognize that our

[illegible] Inc., [illegible] Piedmont Road, Atlanta, Georgia [illegible] Telephone (404) [illegible]

responsibility, both morally and legally, is to continue to utilize the best methods available to protect our customers from the potential dangers arising from the access granted to our customer's homes.

Rollins spends over $1 million a year to screen each potential employee to determine whether any such applicants have ever been involved in criminal activity or exhibit character traits that would create a security risk to our customers. Since 1976, when we first instituted this screening program, we have substantially lowered incidents of employee theft and other criminal behavior directed at our customers.

This screening process is both comprehensive and complex, utilizing the most up-to-date character analyzing tools, including the polygraph. An investigation is first conducted to determine whether the applicant filled out his application truthfully. The applicant is also given a physical examination to determine whether he or she meets the job's physical requirements. The applicant's motor vehicle record is closely scrutinized. This includes a request by ROLLINS to every state for any record of traffic violations by the applicant. All applicants are also subject to a psychological examination designed to determine the applicant's human relations traits and other job related characteristics.

Once all of these tests are completed, the applicant is asked to take a polygraph examination, to be conducted by licensed polygraph examiners. This is a voluntary procedure and each applicant who agrees to take the test must sign a waiver acknowledging that he or she is taking the test voluntarily. Prior to the examination, examinees are given a list of the questions to be asked and have the opportunity to indicate which questions they do not want to answer. The questions are designed to determine the truthfulness of the information provided by the applicant during the overall screening process. No questions are asked concerning a person's religious or political beliefs or a person's sexual preferences.

The length of the examination depends on the applicant's employment history and their responses. Thus, for example, if the applicant is an 18 year old with no prior employment record and no driving record, and no deception is registered during any part of the polygraph examination, that examination may be completed in an hour. However, the examination can take three hours or more when the employee has a prior record of employment that lends itself to a more extensive polygraph examination. An examination could also take that long if deception is recorded at any point during the examination. In that case, the examiner will spend a considerable amount of time determining the cause of the reaction and whether that reading is accurate.

While the polygraph has been proven to be effective when administered properly, ROLLINS does not refuse to hire applicants based solely on a failure in the polygraph test. From January 1, 1986 to March 31, 1986, 34% of the 5402 applicants reviewed by both Rollins Protective Services and Orkin were processed through the employment screening procedure even though they were judged as borderline or deceptive by the polygraph examiners. During that same time period, a full 15% or 511 applicants were rejected because of admissions they made prior to voluntarily taking the polygraph examination that they were either habitual drug users or involved in criminal activity. While these passed over applicants may be suitable for other employment positions, the sensitive nature of our business made it imperative for us to reject them.

If the Polygraph Protection Act of 1985 were law today, we would most likely have hired a large percentage of these 511 unsuited applicants because we would have been precluded from using the polygraph. It is also likely that we might have hired a certain percentage of the remaining applicants who were rejected after both the polygraph and the other examinations concluded that the applicants were unsuited for such a sensitive position. This could have seriously jeopardized the lives or well being of the families that rely on our company.

To date thirty-one states have recognized the usefulness of the polygraph, when applied properly, by adopting polygraph laws. Both Rollins Protective Services and Orkin meet and, in most cases, exceed state guidelines. In addition, Congress implicitly recognized the usefulness of the polygraph when it voted overwhelmingly for the mandatory use of polygraphs for Department of Defense employees with access to sensitive information.

During House floor consideration of H.R. 1524, the companion bill to S.1815, Congressman Young (R. Fla.) and Congressman Darden (D. Ga.) introduced a substitute bill which, instead of banning the use of polygraphs, provides a "Bill of Rights" for those people who might be asked to take a polygraph during the course of seeking employment. This Bill of Rights is based on the same law now on the books here in Georgia. In essence, the Darden-Young amendment establishes guidelines for the training and licensing of polygraph examiners, sets requirements for equipment used in the test, and in general institutes protections for those subject to the examination. In addition, it prohibits the employer from using the results of a polygraph as the sole reason to deny employment or terminate an employee.

Such a Bill of Rights would serve two important objectives. First, it would protect employees from the violation of civil liberties associated with the improper utilization of a polygraph. Second, it would allow private employers like Orkin and Rollins Protective Services to continue to use the best tools available to safeguard the property and welfare of their customers. A polygraph Bill of Rights would also allow the states to adopt more comprehensive legislation as they deem fit. Unfortunately, the Darden-Young amendment was defeated on the House floor.

ROLLINS would strongly support a substitute amendment to S.1815 which would mandate a federal Bill of Rights for those subject to polygraph examination. ROLLINS, like all responsible employers, does not utilize the polygraph as a means to intimidate law abiding citizens who are seeking employment with our company. Rather, ROLLINS takes great precautions to ensure that the polygraph examination is administered fairly and by competent examiners, thereby producing the most accurate results possible. ROLLINS uses these results in conjunction with the results of character analysis tests to make its character evaluation of potential employees. Without such an exemption, I firmly believe that Orkin and Rollins Protective Services, as well as other companies in the home service industry, will no longer be able to effectively maintain the trust placed in them by citizens nationwide.

If the Bill of Rights is not agreeable to the Committee, I urge the Committee to adopt an exemption from the bill's prohibitions against using polygraphs for private employers whose primary business purposes consist of providing in-residence services to homeowners.

As you know, the House version of the "Employee Polygraph Protection Act of 1985" included similar exemptions to the one I now propose for the home service industry. Congresswoman Roukema (R - N.C.) successfully introduced an amendment that gives an exemption to private employers whose primary business consists of providing personnel engaged in the design, installation, and maintenance of security alarm systems whose function includes the protection of facilities, materials, or operations having a significant impact on the health or safety of any state or political subdivision or the national security of the United States.

During the floor debate, Congresswoman Roukema stated that her amendment recognized that "Regardless of any doubts one has regarding the use of polygraphs, there are certain situations where life and property are so extremely vulnerable that we must permit companies to take reasonable precautions."

I wholly agree with the Roukema Amendment and the protection it allows for these sensitive facilities and valuable items. However, I would suggest that we need not look to these Federal and State facilities to find examples of where life and property are vulnerable. Instead, I would look to the average customer of the home service industry who is asked to allow virtual strangers access to themselves, their children, and their possessions based solely on their reliance on the company name and reputation. Very few customers investigate a company's employee screening procedure before contracting with that company for home services. I do not believe they should be expected to conduct such an investigation.

At the same time, I don't think it is necessary for me to suggest different scenarios whereby the criminal and drug element of our society could take advantage of this reliance on a company's judgment. These Federal and State facilites are granted the added protection that a screening process that includes a polygraph provides. Our recent history demonstrates that the average citizen is most vulnerable in his home. I am confident that your constituents and the constituents of the other members of your Committee would look unfavorably on legislation that denies the average citizen's home the same added protection that is provided to our Post Offices.

The arguments raised during debate on two other successful amendments to the House Bill's ban on the use of polygraphs also fully support an exemption for the home service industry. The House Bill exempted employees of child care and nursing home facilities with direct access to children and patients, as well as employers authorized to manufacture or distribute controlled substances. In each of these industries, the polygraph is not used primarily to protect the industries from costly internal theft. Instead, it is used to protect children, the aged, and the general public from the criminal element that could take advantage of the position of responsibility employees are granted by these institutions and businesses.

The passage of the "Employee Protection Act of 1985" as currently drafted would place a company like ROLLINS in a dangerous Catch-22 position. The nature of the home service business requires us to ask our customers to trust our judgment as to the character of the technicians we send into that customer's home. However, without the polygraph, we would be precluded from conducting a comprehensive assessment of the employee's character.

Naturally, we want to avoid the damage to our company's reputation and the cost of litigation that would result from an incident involving one of our employees. In the end, however, it is the customer who would pay for the loss of security if the polygraph is not available. These customers will pay in physical or material losses caused by a technician's abuse of his position, or in the higher costs for services resulting from the company's assumption of the liability for its employees' actions.

I strongly urge the Committee to adopt a Bill of Rights for subjects of polygraph examinations. Such a Bill offers the best means available to protect both the innocent job applicant and the innocent customer from a violation of their rights. In the alternative, I would urge the committee to adopt an exemption from the bill's prohibition against the polygraph for private employers whose primary business purpose consists of providing in-residence services to homeowners. Without such an exemption, the legislation as it is currently drafted would unnecessarily require innocent men, women, and children to rely on an employee screening practice which, by law, would be incomplete.

Thank you for your consideration.

Sincerely,

ROLLINS, INC.

Gary W. Rollins

Gary W. Rollins
President and
Chief Operating Officer

GWR:ca

SAMUELS
JEWELERS

1252 NORTHRIDGE CENTER, SALINAS, CA 93906
(408) 443-0966

Orrin G. Hatch, Chairman
UNITED STATES SENATE
Committee on Labor and
Human Resources
Washington, D.C. 20510

April 25, 1986

Dear Senator Hatch:

I was pleasantly surprised when I received your letter over a week ago, and although I am somewhat disappointed that your committee has not the time to hear my personal testimony; permit me to now discharge my mind on polygraph testing. Ever since that terrible day when the full weight of the polygraph destroyed my career and hopes for the future, I hoped to express my experience, personal loss, and the uphill battle I waged to overcome the stigma of "failing" parts of the polygraph. To the best of my ability I shall be truthful in my recollection of the events leading to, during, and after the incident. Furthermore, I hope that my opinions and suggestions regarding the general use of the "lie detector" will be of benefit to your committee, and most important; I give you my written testimony in hopes that no other person will ever fall victim to the polygraph once you have passed an adequate bill protecting all citizens from this menace to basic liberties and due process of civil laws.

A native of Germany; I came to the United States with my mother in late 1957. A decade later I took the oath of U.S. citizenship while a college student. From 1967 to 1975 I attended the University of Maryland, earning the B.A. in 1969; the M.A. in 1971; and the Ph.D. in 1975. My field of studies were Central Europe, British Empire, and German History; with my Doctoral emphasis on the German Military General Staff during and immediately following the First World War. My entire Graduate Studies were under the guidance of Dr. Gordon W. Prange, who is famous for his infinitive work on Pearl Harbor. Under his direction I matured as a graduate student and submitted a fine Ph.D. dissertation to the University in April 1975.

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My conservative political views alienated me from most of the liberal academic surroundings; thus I found it difficult to secure a profitable position in the university system. Subsequently, and with Dr. Prange's strong support I entered the jewelry industry in October 1976 working for Kay Jewelers in Tyson's Corner, McLean Va.
Having been blessed with a strong discipline, a dedication to duty, and a sense of pride and accomplishment; I moved up the ladder rather quickly and was promoted to Manager in September 1977, taking the "outpost" store in Sandusky, Ohio, nearly 125 miles away from the nearest Kay store. There I matured for one year and then was recalled to the Washington area to open the new Kay store at Lakeforest Mall in Gaithersburg. By now I had the reputation as a "teaching manager"; therefore many young future managers spend time in my store so they could get the training other managers were unable to provide.
Kay Jewelers moved back to the West Coast after a ten year absence in 1979; and I was among the first managers to be moved to California to open a new store in September 1979. Since my supervisor was headquartered in Washington D.C.; I assumed that the company had faith in my honesty, ability, and loyalty. Those characteristics landed me still another new store when I opened the San Jose store in the Eastridge Mall in 1980; but the real claim to fame came to me in February 1981 when Kay Jewelers send me to Las Vegas as manager of their newest venture in unchartered waters. I was informed that I showed the most promise to run that store effectively. Thus, from 1977 to 1981, I managed 5 stores located in 4 states, all which were new stores and required a great degree of personal dedication, sacrifice, and experience. My future with Kay Jewelers seemed promising until an incident in September 1981 proved the beginning of my demise two months later.

With the gift of hindsight, I can see now where it was easy for the Home office to dismiss me at the right opportunity; because as somewhat an outspoken individual, I let my ideas and feelings be known to one and all.

SAMUELS
JEWELERS

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My constructive criticism of Kay policies and proceedures made me less than popular; and when the right opportunity came along, my removal from the company rolls came swift and without warning. I received no final pay since all my moving expenses and personal charge accounts were paid off; thus I found myself literally stranded and economically destitude in Las Vegas after the first week in November. It took me nearly six months to get back on my feet here in California. Now I can look back nearly five years and still remember the events that lead to my dismissal as clearly as if they happened last week.

The origin of my eventual downfall with Kay Jewelers was in early September 1981, when I noticed a ring missing that belonged to a member of my staff. It was customary for me to utilize the company safe for personal use; thus we had a box in which we kept our jewelry so that it would not be taken from our apartments. I had done this practice since I became a manager in 1978, and all my superiors ever told me is that Kay would not be liable for our personal belongings. I accepted that and until September 1981 it was never a problem. I became alarmed when one of my part-time persons never showed up for work or even her check and after checking the safe to see if everything was in order, I found the ring of one of my other employees missing. Logic dictated that the chances were good that the other person who never came back again may have taken the ring; therefore I took Mrs. Leora Kennedy, the owner of the ring, to the Las Vegas Police Department to report a missing ring; in hopes that a pawn shop may have it. Furthermore, I called my Home Office and spoke to Security informing them what happened and what I had done about it. They let me know that Kay would not assume any responsibility and I informed them that Mrs. Kennedy did not seek to collect anything from Kay; in short it was a personal matter in which I played a minor part hoping to recover her cocktail ring. The only reason I informed Kay Jewelers was to get the proper advise on how to handle the situation, obviously a costly mistake on my part.

On the first Sunday in October we lost a 14kt Gold Seiko Man's watch; probably the result of the inexperience of one of my part-time girls. I notified the Home Office and that following weekend, my supervisor/named Kathy Chandler informed me that everyone in the store would be polygraphed. Furthermore she stated that there was some doubt in everyone's mind as to my involvement in the disappearance of Mrs. Kennedy's ring. I informed Kathy Chandler that this matter was not Kay Jewelers problem since no one asked for any compensation or accused anyone. Mrs. Chandler let me know that my integrity was in question but a polygraph exam would lay any such rumors to rest.

For the first time since I joined Kay Jewelers I felt hurt and betrayed. I opened five stores in strange areas, build them up, guarded their assets; and now came under suspicion for merchandise lost that did not even belong to Kay or anyone laid a claim to. Of course I was involved in the ring; I reported it missing, went to the police, and even tried to get advice from Kay's Head of Security. I took the polygraph exam and accoring to its examiner I showed "deception" on questions regarding the missing ring.

A week later we had a "District Region Manager's Meeting in Los Angeles, and I received notification to report early to that meeting in order to have a private meeting with certain superiors to discuss the result of the polygraph. I knew each of those persons well; as a matter of fact I often socialized with them when they visited my stores from Ohio, Maryland, California, and even Nevada.

Present at that meeting in latte October were: John Rambo-Vice President, Donald Delano-Regional District Manager, and Kathy Chandler-District Manager. The meeting was cordial but stern; they all wanted to know why the polygraph did not clear me on the disappearance of Mrs. Kennedy's ring. I let them know that I resented the implication and that my entire career with Kay Jewelers had never been blemished in the past so why now? It came down to the polygraph test and they asked me to take it again. Reluctantly I took the test again on the first Monday afternoon in November. The Thursday of that same week I got a telephone call at the store from the Head of Security; he had arrived in Las Vegas and checked into the Frontier Hotel.

His name was Roger Powers, a ruthless individual who prided himself of never loosing a case; and it looked that I surely was not going to break his perfect record.

It was approximately 4pm when I walked over to his hotel room and was surprised to find the man there who earlier that week administered the polygraph. They seemed to know each other and after a lengthy conversation the tester left leaving Mr. Powers and I alone. The first question he asked me was what I would do if one of my employees flunked a poly. It was a leading question and since I let him know that in my opinion a poly only proves what you want it to prove, he became furious and hostile.
His direct words to me were as follows: "I know you had something to do with the disappearance of that ring; I am here to find out what happened to it, and if I don't get the right answers, you will no longer work for Kay."
Those words I shall remember as long as I live; at that time I felt as if all worlds I knew suddenly collapsed around me. He tried his best to convince me to sign a statement admitting my guilt, but I stood fast to my statement of denial of any wrongdoing.
The following day I drove him to Mrs. Kennedy's apartment where he talked to her for some time, trying to make a connection between her and me. Mrs. Kennedy told me later that he persued the avenue that she and I had a private relationship and tried to milk the insurance company. When he could not get an affirmative response from her, that meeting came to an abrupt end and I received a call to pick him up and return him to his hotel.
Saturday Mr. Powers drilled me again, hoping that I would admit something, but I stood by my story that I did not know what happened to Mrs. Kennedy"s ring. The morning meeting lasted from 9;30 to 11, and then I returned to the store, only to be called back about 2pm. At that time Don Delano was on the telephone and pleaded for me to tell the truth or else my job would be terminated. I surely was not going to lie now, and after Roger Powers spoke first with Don Delano and then called John Rambo, he informed me bluntly: "If you don't tell me what I want to know, I have authority to take your keys; but if you come clean I call Mr. Rambo and see if we can keep you." I knew it was a setup and at that moment my career with Kay

Jewelers had come to a sudden end. What insulted my integrity even more was Mr. Power's final statement: We can't fire you because you flunked the poly, but since you've kept your personal jewelry in our safe that is a violation of Kay's policies and we will use defalcation of policy as the reason for your dismissal." He took my keys for the store right then and walked back with me to the store in the Mall where he informed everyone that I was no longer employed. All my personal belongings were removed immediatel and as of 6pm that Saturday I was out of the Kay company.

That evening after going back to my apartment was one of the few times I can recall sitting down and crying. I suddenly felt like a failure, a person who was suddenly cast out; indeed I felt like a stranger in a strange land. However, the real shock was to come that following Monday morning when John Rambo arrived at the Kay store with the new manager who would take my place. Mr. Rambo and I had enjoyed a cordial relationship over the years; as a matter of fact I had my first interview with him before working for Kay. He took me out for coffee that Monday morning and told me point blank: I know you did nothing wrong, and I am sure you don't know what happened to that ring, but that doesn't matter; you flunked the poly and we can't keep you." After that statement there was really nothing I could do, except accept the fact that a polygraph examiner and his machine destroyed my life, and no matter what happens to me, I shall never forget that terrible event that nearly ruined me financially, made me insecure for some time, and took away what may have been a bright future. If there is anyone who proclaims the true validity of the polygraph exam, have him talk to me and convince me of its pure merit.

Years have passed since that terrible event, and all that time I never spoke to anyone about it. I now have a decent position with another jewelry firm and have settled in Salinas since 1983. As a member of the local Lions Club and a Brother in the Benevolent Fraternity of Elks, I enjoy a degree of communal satisfaction; but nothing that I do and join can ever erase the hurt and humiliation I suffered.

I never spoke to anyone about legal action I can or should take against Kay jewelers because as long as they or any other company can destroy people's careers and lives, each person's individual rights are truly threatened. I feel that a machine violated my rights, but unlike many others, I am lucky for I recovered and live a somewhat fruitful life. With the right help I may challenge Kay's arrogant policy to use a machine to intimidate and destroy careers. I don't know what action I can take or even to whom I can turn; all I am sure of is that I am a victim of the polygraph, a stigma that I have overcome but still others accept as a sign of guilt.

I would like to close with a few comments that may be of benefit to those contemplating the future practice of the polygraph exam. First and foremost, it is vital that people understand the difference between a pre-employment test and an investigative test. In my case there is no doubt that the polygraph examiner was prejudiced against me for he was told that I knew something about the case in question. Since my dismissal from Kay Jewelers I took a couple of pre-employment tests; both were given under a different set of circumstances; the questions were not intimidating, and in my case there was "no deception" regarding past dishonesty or criminal behavior. An investigative poly exam is hostile and in the mind of the examiner there is a guilty party somewhere.
The concept of the polygraph is "unamerican" and goes against all standards of innocent until proven guilty. The polygraph machine accuses an individual and it is up to him or her to prove their innocense. I am personally living proof of that assumption. I see people in total fear when confronted with taking a poly and how excited they are once the polygrapher judges them as "clean." However, if a person fails the test, everybody shuns him or her, for "he or she must have done something wrong; or obviously must be guilty of something." I believe it is a tragedy that in this nation a machine can accuse, and even worse, a person with few skills; usually a washout or retired individual from some lawenforcement agency can become

a polygrapher and be in a position to influence and even destroy people's careers and lives. The question I ask is "Since when is a polygraph examiner so perfect and without human faults that he or she can sit in judgment of others by reading the subject's physical responses to intimidating questions?"
It is my conclusion that the polygraph serves mainly as a tool to intimidate and instill fear in people. It has little or no merit in our democratic society as long as an individual as I falls victim to its accusation and indictment without concrete proof. Our system of laws and justice presumes innocense until proven guilt. The polygraph violates America's democratic principles.

If I can be of further assistance to you and your committee, feel free to contact me and I shall respond immediately to your request. Thank you very much for giving me this opportunity and if my experience reaches the proper channels, I shall take satisfaction knowing that my personal episode will not have been in vain.

Respectfully yours,

Dr. Bernard

Dr. Bernard Schermann

# SECURITIES INDUSTRY ASSOCIATION

Statement for the Record
of the Hearing on S. 1315
Before the Committee on Labor and Human Resources
April 23, 1986

The Securities Industry Association ("SIA")* appreciates this opportunity to offer our views and recommendations concerning the use of polygraph testing and the legislation under consideration by the Committee.

As you may know, the securities industry uses selective polygraph testing for a small percentage of its employees. These tests are generally limited to 1) pre-employment interviews for those who will have direct access to negotiable instruments, securities or confidential information; and 2) internal investigations of a theft or disappearance of negotiable instruments, currency, or securities, a misappropriation of confidential information lists or other

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The SIA is the trade association representing over 500 securities firms headquartered throughout the United States and Canada. Its members include securities organizations of virtually all types -- investment banks, brokers, dealers, and mutual fund companies as well as specialists and other firms functioning on the floors of exchanges. SIA members are active in all exchange markets, in the over-the-counter market and in all phases of corporate and public finance. Collectively, they provide investors with a full spectrum of securities and investment services and account for approximately 90% of the securities business done in North America.

wrongful acts (i.e., the use of inside information, rule violations, or the sending of a false or unauthorized communication). These tests are not conducted randomly or arbitrarily.

As an industry, we are committed to preserving the privacy and civil rights of our employees and prospective employees. To that end, we are selective in our use of polygraph tests and follow strict guidelines when such testing is appropriate.

First, our member firms employ only experienced, reputable polygraph examiners.

Second, in both pre-employment interviews and internal investigations, the polygraph is never the sole determinant for making a decision, but is only a tool used in those processes. Other factors in the hiring process include a face-to-face interview, a written application, reference checks and an FBI report. Similarly, some of the measures taken to investigate wrongdoing include interviews, document research and accounting trials. The polygraph is used only if it is warranted by the circumstances.

Third, the tests are administered selectively. In pre-employment, only those who will have direct access to negotiable instruments, checks, securities and confidential information are tested. Most firms further limit polygraphs by never using the test as the first step in the hiring process. When used for investigatory purposes, the polygraph is used selectively and not on a dragnet basis.

Fourth, the questions asked during a polygraph exam are limited to the particular situation. In a pre-employment interview, the questions bear on the applicant's suitability for a sensitive job such as whether he or she has falsified employment application information, engaged in significant drug usage or thefts from previous employers. Similarly, in an internal investigation, the questions are limited to the facts of the incident being investigated. In neither case is the polygraph a "fishing expedition." Moreover, the industry does not ask questions concerning personal matters such as religious beliefs, political or union opinions, racial views and sexual preferences and activities, and would not object to statutory safeguards along these lines.

Fifth, the tests are administered carefully and professionally. Before each examination, the polygrapher reviews the questions with the subject as well as any problems the subject might have in answering them. During the examination, the subject is asked the exact questions that were reviewed previously. If, during the test, there is an unusual reaction in answering a question, the test may be stopped and the examiner will attempt to clear up the matter. After the exam, an attempt is made to resolve problematic answers, including retesting if warranted. These tests are of sufficient length to ensure that decisions are not based solely on physiological responses.

The SIA requests that the legislation under consideration by the Senate (Polygraph Protection Act of 1985 - S. 1815) be amended to allow registered broker-dealers and other financial entities to continue the limited polygraph testing currently engaged in by the industry.

Our request for an exemption has a strong public policy underpinning: the securities industry is regulated extensively by both government agencies and self-regulatory organizations which have a mandate to protect the investing public and the nation's securities market. As the object of this regulation, securities firms are held to an unusually high standard of accountability. In order to meet that standard, it is important that these firms be permitted to use all available technical means, provided they are used responsibly and fairly.

Logic also dictates that this legislation be drafted to consider the needs of securities firms. A small percentage of these firms' employees have direct, physical access to billions of dollars of cash, checks and securities as well as important confidential information belonging to the investing public. These firms, as fiduciaries, can be held liable for their customers' losses resulting from the misappropriation or misuse of these assets. In this light, it would be appropriate to permit polygraph testing as both a prophylactic measure in the hiring process and as an investigatory tool.

We would prefer not to see the exemption limited to particular types of pre-employment or investigatory questioning. It would be difficult for example, to attempt to enumerate particular types of property, the theft or disappearance of which might justify the use of a polygraph as part of the internal investigation, especially where the theft of disappearance might be principally significant as evidence of a breakdown in the firms' system of internal controls. As is true in other areas of human affairs, a single act of dishonesty can have a debilitating effect on an organization that is out of all proportion to the value of what has been stolen.

If some limits on the exemption were deemed necessary, we believe they should be structured so as to permit testing in the following general circumstances: 1) interviewing prospective employees who will have direct access to currency, negotiable instruments, securities or confidential information; and 2) investigating the theft or disappearance of currency, negotiable instruments or securities, the misappropriation of confidential information, or other wrongful acts related to job qualifications. Of course, this testing should be consistent with the technical and professional standards outlined above.

Please consider that the industry does not advocate the polygraph test as an infallible barometer of truth. Rather, we regard it as an instrument which, when properly used, can aid in hiring personnel for sensitive positions and in investigating thefts and wrongful acts. As such, comparable alternative technology does not exist.

In recognition of these benefits, the House passed the Employee Polygraph Protection Act (H.R. 1524) which, while prohibiting most polygraph testing, exempted certain industries which use the polygraph for the same purposes as securities firms, including all government workers. Most significantly, the House saw fit to grant an exemption to private security services which protect among others, "currency, negotiable securities, precious commodities or instruments, or proprietary information (emphasis supplied)." Undoubtedly, it would be anomalous legislation that permits polygraph testing by those who protect currency and securities but prohibits such testing by those who possess and process the same currency and securities.

In sum, the wholesale prohibition of polygraph testing ignores the special needs and circumstances of the financial services industry. Considering these factors, together with our commitment to fair polygraph testing, SIA urges you to amend the bill before you to permit continued limited polygraph testing by the industry.

## STATEMENT OF THE SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC ON S. 1815, POLYGRAPH PROTECTION ACT OF 1985

The Service Employees International Union has 850,000 members, about half of whom work in the private sector. SEIU locals have contracts in many industries where polygraph tests are routinely given to employees--building services, healthcare, hotels and restaurants, security firms, jewelry manufacturers and utilities, among others. Our members find these tests degrading and an invasion of privacy. At the same time, the scientific evidence finds no correlation between such testing practices and the prevalence of employee theft and other abuses. Based on this experience, we strongly support legislation to outlaw lie-detector tests from American workplaces.

More than two million Americans took lie-detector tests last year, the vast majority (98 percent) in the workplace. This is up five-fold from the 400,000 tests reported in 1979. More than 30 percent of the Fortune 500 companies and at least half of the banking and retail trade firms rely heavily on job tests. The frenzy of employer testing has rapidly spread to all parts of the fast-growing service sector, which accounts for roughly three out of four jobs.

Employers view polygraphs as an inexpensive way to protect against business theft when their employees handle large sums of money. Estimates of employee theft vary widely--ranging from $5-$50 billion. The U.S. Congress' Office of Technology Assessment estimates about $10 billion annually in business losses due to "internal crime" (which involves more than employee theft) in private industry. The American Management Association estimates that employee theft costs businesses $5-$10 billion a year.

Whatever the dollar total, polygraph testing has been shown to be a grossly unreliable tool to controlling employee theft. Upon review of 30 field studies, the

Office of Technology Assessment (OTA) concluded in their 1983 report, "Scientific Validity of Polygraph Testing" that, "There is little research or scientific evidence to establish polygraph test validity in screening situations. . . " Other studies show the lie-detector tests to be biased against truthful people. The more honest workers are, the more likely they will fail the test because of their heightened sensitivity to having their honesty challenged, or from fear of suspicion being misdirected at them. Dr. Leonard Saxe, the author of the OTA report, agrees that "because exceptionally honest and intelligent individuals may be highly reactive to questions about their truthfulness, such desirable employees will be misidentified at higher rates than other less desirable employees." The scientific studies find that between 36-54 percent of the innocent people who take the polygraph exam test as liars. Such margins of error are unacceptable in an employment context. Innocent workers who fail the test carry this stigma with them on their personnel with destructive consequences for their careers.

Companies which use polygraphs on their employees are looking for a "quick fix". The problems which they hope to solve by polygraph testing could be addressed through less objectionable means which are more cost-beneficial to both employers and employees. Studies recommend a variety of solutions to reduce employee theft--intensive background checks, tight inventory control, fairness in employer-employee relations, ethical behavior by higher management, adequate communication, recognition of quality performance, and competent supervisors.

Not only are polygraphs ineffective, they are an invasion of workers' rights to privacy. OTA noted that employees and job applicants who have undergone polygraph examinations have been asked a host of non-job-related questions about family problems, sexual preferences, whether the employee has ever been tempted to steal, intended length of stay on the job, personal finances, drinking habits, political beliefs, and marital relations. Such questions have nothing to do with cleaning a building, typing letters and other service occupations.

We strongly oppose the various exemptions for private sector employment in H.R. 1524, as amended, as unreasonable and unnecessary. H.R. 1524, as amended, exempts private sector employers who claim special needs for polygraph tests, such as drug manufacturers and distributors, various security services, public utilities, children's day care centers, and nursing homes.

The selection of these industries for exemption appears totally arbitrary. For instance, the polygraph test has no proper role to play in nursing homes. As a rule, nursing home workers don't even handle large amounts of cash or drugs. Instead, polygraphs have become vehicles for employee intimidation and for screening out employees who may join a union.

For example, five SEIU Local 100 members who worked at Weldon Healthcare Center in Kenner, Louisiana were summarily fired after failing a polygraph test, all of them on the union organizing committee or union supporters.

Typical, among them, was Evelyn McCray, a mother of four, who was fired for flunking a polygraph test after eight years on the job. Her employers refused to tell her how she failed the test. The former nursing assistant started out making $3.35 an hour. It took her eight years to work her way up to a $3.95 hourly rate. Her human tragedy translates into unemployment and family poverty.

The real problem in the nursing home industry is low wages, high employee turnover, and notoriously low staff-to-patient ratios. The solutions are decent wages and benefits and better working conditions for workers. There is simply no rationale for nursing homes to receive special dispensation from a polygraph ban. The same is true for security guards, of which we represent about 20,000 and who work mostly for security firms.

Collective bargaining provides some safeguards against polygraph testing. Building maintenance workers in San Jose, California faced a hard choice--submit to a polygraph or face discharge. Without our Local 77's grievance machinery, these employees would be in the unemployment lines. Local 1-J in New York City won a landmark arbitration case against making jewelry workers take the unreliable polygraph tests in order to keep their jobs.

However, collective bargaining does not help the millions of unorganized service workers nor those who face pre-employment testing. The American Polygraph Association estimates that 75% of employment polygraph tests were given for such job screening purposes. 50,000 people a year are denied jobs because of polygraph tests.

In short, the polygraph is a highly fallible and destructive device, whose removal from America's workplaces should be a top employment priority. Employees have the right to fair employment opportunities without coercion. Businesses that use the device do not really need to do so. Twenty-one states already ban or restrict the use of polygraphs in employment, and yet employers are still able to run profitable businesses and hire honest and capable employees in those states. For these reasons, we strongly urge the quick passage of S. 1815--in its current form--to ban the use of polygraph exams by private employers.

Small
Business
Legislative
Council®

Statement of
Small Business Legislative Council
on S. 1815
Submitted By
John S. Satagaj, President
To The
Committee on Labor & Human Resources
United States Senate
April 29, 1986

On behalf of the Small Business Legislative Council (SBLC) I wish to express our reservations regarding S. 1815, the Polygraph Protection Act of 1985.

The Small Business Legislative Council (SBLC) is a permanent coalition of eighty-eight trade associations representing over four million small businesses. Our sole mission is to represent the interests of small business in national policy matters.

SBLC opposes S. 1815's complete ban on private sector employers' right to use polygraph tests, and encourages Senators to seek an appropriate balance between the rights of individuals and those of private sector employers.

If there is one message we can convey to this committee, it is that the small business sector does have an interest in the use of polygraph tests. Small business in a wide range of industries utilize the polygraph as a pre-employment screening device or as an internal investigation tool. Polygraph tests are effective in reducing employee theft and providing a safe workplace for all. Many businesses choose not to use polygraphs but it is their choice and for those businesses who need such security we believe the option should remain in their hands.

S. 1818 would prohibit the use of lie detectors by private employers, with limited exceptions, for pre-employment screening, or in discharging, dismissing or disciplining an employee. The prohibition against the use of lie detectors would include polygraphs, deceptographs, voice stress analyzer, psychological stress evaluators, or any similar device using mechanical, electrical or chemical methods as a truth verifier.

It is important to note that S. 1815 would permit the use of polygraph tests by the United States Government, a state government, city, or other political subdivision. As an exception to the ban on private employer use, personnel of Department of Defense contractors with access to classified information could be subjected to polygraph examinations as well. S. 1815 would preempt all current state regulations. It appears contradictory to recognize the validity of polygraph tests in some instances and not others. It would be more appropriate for the government to establish standards rather than pick and choose exceptions.

SBLC recognizes the need to protect the rights of the individual but we believe this protection can be established through the use of minimum standards, if the Congress feels compelled to address this at all.

Most firms readily admit the test alone does not constitute an adequate security program. Assurances can be built into a regulatory system as can standards for examiners, if necessary, to address the examinees' concerns without a blanket ban on the use of polygraphs. Currently 31 states have regulated the use of polygraph testing by employers.

State regulations have struck a reasonable balance between the rights of current employees and the rights of employers, prescribing guidelines and standards for polygraph examiners. However, if should Congress deem it necessary to proceed to establish federal uniformity on polygraph use, SBLC recommends passage of amendments to S. 1815 that would: 1. establish minimum standards for the use of polygraph tests in employment; 2. provide for the certification of polygraph examiners; 3. set minimum standards for polygraph examiners; and 4. provide relief for improper use of polygraphs.

The rights of prospective and present employees could be protected by making examinations voluntary, prohibiting the use of polygraph tests as the sole standard for determining employment status, and providing examinees access to polygraph results. In addition, polygraph examiners should be restricted from inquiring into religious beliefs or affiliations, beliefs or opinions regarding racial matters, and other protected subject matter. Only by striking a balanced approach will Congress protect the rights of employees and recognize the practical needs of American business in assuring consumers safe and reasonably priced merchandise. SBLC strongly recommends that the Senate Labor and Human Resources Committee amend S. 1815 to recognize the legitimate rights of private sector employers. We thank you for this opportunity to present our views and look forward to working with the Committee.

United States Senate
Committee on Labor and Human Resources

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Statement of the
Society of Independent Gasoline Marketers of America

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Regarding S.1815

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April 23, 1986

The Society of Independent Gasoline Marketers of America ("SIGMA") is a national trade association of 316 chain retailers and independent marketers of motor fuels. SIGMA's members market refined petroleum products in all 50 states through over 16,500 retail outlets and employ approximately 98,000 people. SIGMA's members sales constitute between 15 and 20 percent of the retail market for gasoline in the United States.

Independent marketers and chain retailers, such as SIGMA's members, historically have been recognized as the most innovative and cost-effective segment of the retail gasoline market. Such companies have pioneered cost-effective marketing techniques such as self service, automatic dispensing units, and the high volume/low margin style of retailing. These marketing techniques generate substantial cost savings and minimize the amount of fixed costs which must be recovered in the selling price of each unit of motor fuel. As a result of these innovations and their superior operating controls, SIGMA's members are able to offer motor fuels to American consumers at the lowest possible cost. Historically, SIGMA's members have been viewed as the most price-competitive segment of the domestic retail motor fuels market.

SIGMA opposes legislation that would prohibit employers' use of polygraphs or other devices designed to detect deception in relation to the employment relationship. SIGMA members have found such testing a useful component of a program to prevent employee theft through pre-employment screening and post-employment testing. Prohibiting the use of such tests would invite increased employee theft and render screening of prospective employees more expensive and less effective. SIGMA believes that banning polygraph and similar testing is the first step in a campaign to eliminate other legitimate techniques for screening prospective employees and investigating current employees. The increased costs of employee theft and ineffective screening would be passed on to consumers in the form of higher prices. Moreover, legislation banning the use of polygraphs overlooks the valuable advantage polygraph testing gives to honest employees.

## Polygraph Testing Assists Retailers in Controlling Shortages

Polygraph testing has been a necessary and invaluable procedure for companies in the retail gasoline industry. They incorporate such a procedure into their internal programs to protect themselves against theft. Our industry is especially vulnerable to employee theft because it depends heavily on high sales volume and cash operations.

Shortages are a way of life in retailing. It is impractical for a retailer whose operations incorporate high sales volumes and cash transactions, as well as a broad physical inventory such as that in a convenience store, to justify and to account for all of his physical inventory and cash at the end of each shift. Thus, retailers, as a class, constantly are faced with shortages. As a result, shortage control becomes a way of life in the retailing industry.

Employee theft of inventory and cash is largely responsible for shortages in our industry. We do not claim that polygraph or similar testing are perfect. Nevertheless, we have found such testing to be a reliable and effective technique which assists us in controlling shortages.

Polygraph testing prevents employee theft through improved evaluation of prospective employees and deters thefts through the credible threat of identifying those responsible for crimes that do occur. Without such testing, losses due to employee theft and the costs of prevention would increase and would be passed on to the retail consumer.

Shortage control in the retail gasoline is an imprecise science even with polygraph testing. Our employees are predominantly "entry-level" workers earning at or near minimum wage and turnover is high. Individual accountability is very difficult because several employees usually have concurrent access to the cash register and the inventory. Under such circumstances, the temptation to steal can be great. Because of the potentially great levels of employee theft, employers are engaged in a constant search for ways to control the resulting shortages. Responsibly administered and evaluated polygraph testing is the best means available to an employer by which he can make an identification of individual employees who are stealing.

Polygraph testing, when administered correctly, enables employers to differentiate preliminarily among employees who are not stealing, employees who are stealing only small amounts, and employees who are stealing large amounts. Not all employees whom a polygraph identifies as stealing are dismissed. Moreover, because employees appreciate the reliability of the polygraph, thefts are frequently admitted or a suspected employee leaves before having the test administered. Such admissions, as well as detection by the polygraph of thefts, can lead to reimbursement to the employer, counseling for employees, and potentially full reconciliation and resolution of the problem. In either event, the problem of shortages is greatly alleviated to the benefit of the employer, the employees, and the consumer.

It is important to employers and employees alike that an employer be allowed to use a polygraph to deter or identify dishonest employees. Innocent employees suffer if the employer is unable to identify guilty employees. For example, at a retail gasoline outlet very often only two or three employees have concurrent access to the cash. If the accounting for cash shows a shortfall and an employer is unable to identify through polygraph testing the source of the missing cash, he has no alternative but to dismiss all the employees with access to the cash. Use of a polygraph test alleviates this situation in two ways: (1) it deters dishonesty by assuring a dishonest employee that he or she will be submitted to a veracity test, and (2) it serves as an important component of a theft deterrence program, by enabling an employer to take appropriate action against the guilty employees and retain the innocent employees. Banning polygraphs would limit an employer's options. Many honest employees would be ensnared in a web of criminal activity in which they played no part. By deterring dishonesty, polygraph testing protects and exonerates innocent employees.

Banning polygraph and similar testing is the first step in a campaign to eliminate other legitimate techniques of certifying the honesty of prospective and current employees. Other such methods involve scientific surveys of employee attitudes toward honesty, crime, and the employer. Employers use these surveys to develop the most positive workforce available and to evaluate employee morale. Although these surveys are no substitute for polygraph testing in avoiding the hiring of dishonest employees and deterring employee theft, they provide valuable information that enables employers to improve the productivity of employees. If the rationale for banning polygraph testing were applied to ban these types of surveys, employers, employees, and consumers would lose the benefits such surveys provide.

## Polygraph Tests Are the Most Efficient Way of Screening Prospective Employees

Because of the nature of the gasoline retail industry, it is important to have an effective screening process to reduce the number of potential thieves in the pool of prospective employees. Polygraph and similar testing, if banned, would have to be replaced by other employee evaluations.

Without the assistance of polygraph or similar testing, operators of retail gasoline outlets would have to rely on previous work records, arrest and conviction records, credit checks, and personal investigations permissible under the Fair Credit Reporting Act and other federal statutes to the detriment of prospective employees.

These evaluations, which serve as alternatives to the devices the use of which this legislation would prohibit, are often ineffective, costly, and time consuming. Former employers, increasingly concerned with potential suits for defamation of character, often refuse to report more than a former employee's term of employment and job description. Other forms of personal investigations often result in employers obtaining private information of the same kind that a ban on polygraph testing and other federal statutes seek to keep private. The added expense and unreliability of alternative methods of evaluating prospective employees would increase the costs of preventing employee theft. Ultimately, these costs would be passed on to the consumer.

## Conclusion

Because of the valuable benefits that the proper use of polygraph or similar testing provide, Congress should not ban such testing. Admittedly, a program of polygraph testing can be abused by unscrupulous employers and ill-trained and unqualified polygraph operators. However, the solution to these problems is regulation of the polygraph industry, not an outright prohibition against all employers.

SIGMA believes that polygraph and similar testing deters crime. Polygraph tests have proven to be reliable and effective methods of deterring employee theft. Polygraph tests enable employers to screen prospective employees who have records of dishonesty and criminal activity. Polygraph testing helps employers identify and deter dishonest employees and vindicates innocent employees. SIGMA believes that without polygraph testing retailers' losses due to employee theft will increase as will the cost of screening employees. Accordingly, SIGMA urges this Committee to reject S.1815.

***JOHN M. STONE COMPANY***
**Real Estate, Oil & Gas**

*John Morris Stone, CCIM, CPM*
*Mary Banks Stone, GRI*
*John Madison Stone, GRI (1925-1982)*
*Joy L. Tully*

April 22, 1986
Reply to Dallas

Orrin G. Hatch, Chairman
United States Senate
Committee on Labor & Human Resources
Washington, D.C. 20510

Re: Legislation on Limiting Polygraph
Testing in the Work Place

Dear Senator Hatch:

Enclosed, in response to your letter dated April 11, 1986 in which you elicited my submitting a statement outlining my opinions and suggestions with respect to polygraph testing which you will include in the hearing transcript of the Senate Committee on Labor & Human Resources with regard to this polygraph testing in the work place legislation, please find enclosed my letter to the Honorable Lloyd Bentsen, United States Senator from Texas, which will outline the comments that I wish to have included in the transcript, in addition to this letter. What one serving in Congress may not realize is that the issue here transcends the mere issue as to whether or not an employer has the right to interfere with the so-called "Civil Rights" or, "Rights to Privacy" of an employee. The issue here also encompasses whether or not an employer has a reasonable right to protect not only its own company but also those who look to it as a fudiciary agent for the actual or possible civil or criminal violations of those that might be in their employ. How this differs drastically from the position of a Senator or a Congressman lies in the fact that if a Federal employee commits a civil or criminal violation, a Congressman or a Senator is not held civilly or criminally liable for the misdeed of that employee, whereas an employer can be.

To cite a specific example: if a guard in a Federal building in Washington rapes a woman employee, the Federal Government is not likely to be sued in civil court by that employee whereas if such an action takes place in a privately owned building, there is a high probability that the building owner as well as the management company of the building will both be sued in a civil action in addition to the crime victim pressing criminal charges against the actual culprit. At present, the only effective screening device that either the building ownership or the management company or, in the case of an independent contracting firm, the owner of the security service might have is the polygraph testing. Never mind the fact that we must carry Errors and Omissions Insurance which protect us "after the fact".In today's insurance crisis situation, we really need protection to keep the action from happening in the first place.

*6060 North Central Expressway, Suite 512, Dallas, Texas 75206, 214/368-7133*
*1324 Olive Street, Texarkana, Texas 75501, 214/794-7338*
*P. O. Box 299, 711 Park Highway, Minden, Louisiana 71055, 318/377-6585*
*Shreveport-Bossier City, Louisiana, 318/222-8139*
*1500 Worthen Bank Building, Little Rock, Arkansas 72201, 501/372-3374*
*D-FW Metro 214/263-8091*

Another example would be an apartment maintenance employee burglarizing an apartment unit in which a family lives. Because apartment maintenance employees usually have master keys or have access to keys otherwise if they do not have master keys -- even though work is normally only performed on a work order basis, polygraph testing prior to employment is the only effective screening that the owner of the apartment house has, the tenant in the apartment house has and the management company employing the maintenance employee has to prevent such an action from happening or at least to lower the probabilities of its occurrence. As stated in Senator Bentsen's letter, we have experienced countless examples of persons applying for employment with our firm to be apartment maintenance employees. We have found numerous times upon checking the applications rigorously that they falsified information upon their employment applications. With others, who were quite clever at falsifying their information, the only effective screening we had against their employment was pre-employment polygraph testing as well as the right to re-test them at any time during their employment at will.

When someone has keys to hundreds of homes or hundreds of business locations or hundreds of stores, they need to have a security clearance just as much as someone who is doing business with the government needs to have a security clearance. These are sensitive areas made much more so by the fact that the victims of criminal or civil misdeeds in such instances in the private sector have the right of civil liability against the owner of the property or the manager of the property -- both of whom are held in places of fudiciary responsibility and are deemed to have violated their fiduciary responsibility when the misdeed of an employee occurs.

If Congress wants to give a blanket exclusion from building owners and from management organizations which have employees for the criminal or civil violations of their employees, then the position of the House of Representatives in seeking to exclude the private sector from the right of work place polygraph testing would seem reasonable. Since it is unwilling, apparently, to grant polygraph testing on both a pre-employment basis and also upon a re-testing basis after hiring to employers or building owners in the private sector, then I think that such legislation is without substance and merit in the "real world". Quite frankly, I have never had an employee applicant who became a decent employee who minded having the polygraph testing on a pre-employment or a re-testing at any time during employment basis. I can understand how those who are involved in criminal actions on an on-going basis or who have in the past been involved in criminal actions would object to such testing. Indeed, many of the applicants that we have had who have objected and refused to take polygraph testing have revealed to us that they have been involved in previous years in illegal actions, while on others polygraph testing has revealed to us that they are currently involved in illegal activities. As those charged with the responsibility for the security of apartment homes offices and retail businesses, as well as light industrial spaces, we simply cannot abide such intrusions into our rights as fiduciary agents to have the responsibility of the security of such quarters. It also protects both us and our customers and our clients from theft and other criminal actions besides those of violent crimes. I urge the United States Senate to reject the current polygraph testing in the work place legislation as proposed in the U.S. Senate or as promulgated by the recently passed House of Representative legislation in the same area.

Sincerely,

JOHN M. STONE COMPANY

John M. Stone

John M. Stone, CCIM, CPM

JMS:jlt

cc: The Honorable Lloyd Bentsen
United States Senator

The Honorable Phil Gramm
United States Senator

Enclosure - Letter to Senator Bentsen - Should be in the record also.

*JOHN M. STONE COMPANY*
**Real Estate, Oil & Gas**

*John Morris Stone, CCIM, CPM*
*Mary Banks Stone, GRI*
*John Madison Stone, GRI (1925-1982)*
*Joy L. Tully*

March 14, 1986
Reply to Dallas

Honorable Lloyd Bentsen
United States Senator
703 Hart Senate Office Building
Washington, D.C. 20510

Re: House Bill to limit use of Lie Detectors

Dear Senator Bentsen:

As the enclosed article which appeared in yesterday's Dallas Morning News indicates, legislation has recently passed the House limiting lie detector usage.

As a Certified Property Manager, engaged in leasing and managing office space, retail space, light industrial space and garden apartment buildings, I must register, as your constituent, my strong and steadfast opposition to limiting the use of lie detector testing.

With the alarming epidemic of crime and drug usage sweeping our nation, we require pre-employment lie detector testing of all our employees, along with the right to retest them at any time during their employment. Our employees have access to cash from rentals and keys to apartment units that tenants call home, spaces where tenants office their businesses and store spaces where tenants carry on their livelihoods and stock their inventories.

Having lie detector testing has saved us a lot of grief. Example? A lie detector test once revealed that a "preppy-looking" applicant had stolen from every employer he had ever had and had stolen from occupants of buildings where he worked and that he had been an habitual user and dealer of cocaine, marijuana and other controlled substances both off the job and also in the workplace. As an employer, I do not need the liability that accompanies such employees...neither do my tenants. The only effective way I can screen against them is with lie detector testing, since they often fabricate applications or only put down favorable references, often omitting pertinent details. As a private businessman, it is economically impossible for me to subject every applicant to the scrutiny of an FBI-type background investigation. In our Dallas/Fort Worth area operations, we found that about 75% of all our applicants for apartment community maintenance positions either had felony criminal records or else were habitual users of drugs...and the only effective way to filter them out was with lie detector testing.

*6060 North Central Expressway, Suite 512, Dallas, Texas 75206, 214/368-7133*
*1324 Olive Street, Texarkana, Texas 75501, 214/794-7338*
*P. O. Box 299, 711 Park Highway, Minden, Louisiana 71055, 318/377-6585*
*Shreveport-Bossier City, Louisiana, 318/222-8139*
*1500 Worthen Bank Building, Little Rock, Arkansas 72201, 501/372-3374*
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Neither we nor our tenants need to be subjected to such abuse just so some liberal in Washington can "feel better" about protecting someone's "rights". We the law-abiding employers and tenants of this nation have rights, too! And we want the safety that lie detector testing enables us to have.

People with access to keys to apartment homes, offices, retail or industrial spaces must be tested with lie detectors on a pre-employment basis, with the employer retaining the right to retest them at any time. That also applies to employees who handle cash or rental checks. Bonding is not really effective ...it only gives the insurance company the right to sue the culprit or us the right to sue an insurance company to collect on a surety bond. Lie detector testing is the only effective weapon against abuse from an employee than an employer has. This is particularly true of small businesspersons such as myself.

This legislation is nothing more than another misguided attempt of the "Teddy Kennedy-type liberals" in the Democrat party to peel away another right in the name of "protecting rights". What an oxymoronic situation!

I urge you to do your utmost to get this legislation defeated in the United States Senate or else buried and forgotten in conference committee.

This is dangerous legislation! It strikes at the safety of folks in all walks of life.

Sincerely,

JOHN M. STONE COMPANY

John M. Stone

John M. Stone, CCIM, CPM

JMS:jlt

**U.S. Department of Justice**

Drug Enforcement Administration

*Washington, D.C. 20537*

Mr. Ty Kelly
Vice President for Government Affairs
National Association of Chain Drug Stores
P.O. Box 1417-D49
Alexandria, Virginia 22313

Dear Mr. Kelly:

Per your request the following is provided regarding DEA statistics relative to employee drug thefts and previously issued policy regarding the use of polygraph for screening of applicants or employees.

First, regarding employee drug thefts, as relayed to you previously, comprehensive statistics are not available, but the following information should be useful to you:

> For the period from July 1982 thru July 1983, total thefts reported to DEA were 6721. 593, or 9% were reported as "employee thefts." For nine months during this period, a total of 582,893 dosage units (out of a total of 13,614,334 dosage units) were reported as employee thefts, or 4% of the total units reported stolen for nine months.
>
> For the fifteen month period of January 1984 through March 1985, a total of 8,861 drug thefts were reported to DEA, of which 1,376 thefts (16%) were reported as "employee theft." Statistics regarding total dosage units stolen during this period are not available.

Secondly, DEA has previously commented on the use of polygraph examination in the screening of applicants or employees of registrants who will have routine access to controlled substances. DEA regulations concerning employee screening procedures are covered in Title 21, Code of Federal Regulations, Part 1301.90 -1301.93.

It has been DEA's experience that extreme care is necessary on the part of drug firms, both in hiring and monitoring employees who have routine access to controlled substances. These drugs command an illicit price which is many times their legitimate value, thereby, creating an attractive temptation.

Mr. Ty Kelly

The polygraph examination, utilized as one aspect of an employer's comprehensive employee screening, monitoring and investigatory programs, for employees with routine access to controlled substances has proven to be an effective means of determining criminal background, history of drug use, and knowledge of or participation in the diversion of controlled substances. Information obtained as a result of the polygraph examiniation should be considered as but one part of an overall evaluation of the person's qualifications or continued employment.

DEA supports the use of the polygraph examination for pre-employment screening and as a subsequent investigatory tool in appropriate cases, provided that it is permitted by state and local laws. Those drugs firms which utilize these procedures as part of their comprehensive program to minimize diversion are to be commended.

I hope this information will be useful to you.

Sincerely,

Ronald W. Buzzeo, Deputy Administrator
Office of Diversion Control

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**U.S. House of Representatives**
**Committee on the Judiciary**
**Washington, DC 20515-6216**
**Telephone: 202-225-3951**

GENERAL COUNSEL
M. ELAINE MIELKE

STAFF DIRECTOR
GARNER J. CLINE

ASSOCIATE COUNSEL
ALAN F. COFFEY, JR.

April 21, 1986

The Honorable Orrin G. Hatch
Chairman, Committee on Labor
  and Human Resources
United States Senate
Room SD-428
Washington, D.C. 20515

Dear Mr. Chairman:

On Wednesday, April 23, 1986, when your Committee conducts a hearing on S. 1815, I urge you to consider an issue of particular importance to me. As you know, financial institutions are key targets for money launderers whose primary goal is to hide the illegal source of huge amounts of dirty cash. In a great many instances, the money launderers require inside assistance from bank employees. I feel very strongly that such employees should be subject to polygraph testing as a primary deterrent and tool in uncovering corruption by drug traffickers and others with huge amounts of illegal money.

In some instances the health of the financial institution itself is at stake. Financial institutions operate with other people's money on the basis of trust. While most financial institutions have regulations covering actions that they may take in commerce with depositors' money there are no regulations that cover the conduct and integrity of prospective employees. For banks, over 80 percent of losses occur from internal theft. In 1983 financial losses to banks from internal theft amounted to over $282 million. In 1984 that increased to over $382 million, and that is while they were using polygraph tests to try to screen prospective employees. While many of those losses are insured, the costs of those thefts occur to all depositors and not all losses are insured.

Your consideration of an amendment permitting polygraph testing for financial institution employees who handle currency of financial transactions is vitally important. I offered such an amendment to H.R. 1545 during its consideration by the House of Representatives on March 12, 1986. My amendment, which did not preempt state law, would have permitted polygraph testing for employees or prospective employees who handled financial transactions.

Unfortunately this amendment was defeated late in the day by a vote of 194-217. I believe that the close nature of the vote, however, indicates the interest in and need for an exception to permit a financial institution access to polygraph testing of its employees engaging in financial transactions on behalf of the institution. This exception is vital to our law enforcement and financial security interests.

I urge you to consider this type of exception and respectfully request that this letter be made a part of your hearing record.

Very truly yours,

Bill McCollum

Bill McCollum
Member of Congress

BMcCCVHS

## COMMITTEE ON LABOR AND HUMAN RESOURCES

## STATEMENT OF JAMES JOY, JR., NATIONAL PRESIDENT
## UTILITY WORKERS UNION OF AMERICA, AFL-CIO
## PROHIBITING THE USE OF LIE DETECTORS BY EMPLOYERS
## SENATE BILL S. 1815

The Utility Workers Union of America would have no difficulty in supporting fully S. 1815 and H.R. 1524 as they were originally submitted for consideration. The need for strong, meaningful federal legislation prohibiting employers from using lie detectors and other such devices to deny employment, to discipline and discharge innocent workers, to deny promotions and take other arbitrary actions based solely on the outcome of such examinations has been well established.

The use of a polygraph, deceptograph, voice stress analyzer or psychological stress evaluator to detect deception or for verifying the truth of statements is an inexact science, to say the least. While one can accept the accuracy of properly calibrated equipment to measure blood pressure, respiration, pulse rate and other bodily functions, and one can accept the accuracy of the measurements in variations of these pulsations, there is no clear evidence that such variations occur only when an individual is not being truthful. Beyond the fact such measurements are made by the various types of equipment used in this process, the conclusions are totally the individual judgements of the examiners.

At present, there are not recognized standards for determining the competency of polygraph examiners, there is no prescribed training or education requirements and no way of analyzing the veracity of the examiner or his prejudices, irrespective of his ability and training. As a result, as many as 50,000 persons have been wrongfully denied employment or have been fired each year because of the device's unreliability by some estimates.

However, it is not necessarily our purpose in submitting this statement to provide support for the passage of the Bill as we assume others scheduled to testify will address the situation in general and it need not be repeated by our organization. We would however, like the record to show that the Utility Workers Union of America does support the passage of the Bill without exemptions.

Our main purpose in addressing the Committee on this matter is to seek elimination of the exemptions. We are not totally conversant with the problems and situations in other industries or occupations where exemptions have been made in House Bill H.R. 1524, therefore, we will not address our remarks to the exemptions other than those affecting workers in the utility industry, other than to comment that it seems to me to be totally unreasonable for a legislative body to develop protection for the citizens they represent from being subjected to a totally unreliable craft that is degrading and humiliating and then suffering the "capital punishment of industrial life", the denial of gainful employment, and then providing exemptions for particular segments of society. Where is the equal protection under the law in such instances?

The Utility Workers Union of America and its predecessor the Utility Workers Organizing Committee have represented workers in the utility industry since 1937 and, therefore, we feel qualified and obligated to seek the elimination of the exemptions included in H.R. 1524 by the Broomfield Amendment which states:

> "(f) PUBLIC UTILITIES EXEMPTION. -
>
> (1) Subject to paragraph (3), this Act shall not apply with respect to
>
> (A) an employee or prospective employee of a public utility engaged in the production, distribution or transmission of electric energy; or
>
> (B) an employee of a contractor with any such utility.
>
> (2) The exemption provided under paragraph (1) shall not diminish an employer's obligation to

comply with

(A) applicable State and Local law, and

(B) any negotiated collective bargaining agreement, which limit or prohibit the use of lie detector tests on such employees.

(3) The exemption provided under this subsection shall not apply if

(A) the results of an analysis of lie detector charts are used as the sole basis upon which an employee or prospective employee is discharged, dismissed, disciplined in any manner, or denied employment or promotion, or

(B) the test is administered to an employee or prospective employee who does not or would not have direct access to computers, generators, power lines, or other facilities or equipment related to the production, transmission, or distribution of electric energy."

It is our contention that there is absolutely no justification for exempting electric utility employers from the requirements of the "Polygraph Protection Act of 1985". However, even if there was some ridiculous conclusion that an employee having access to a computer used for billing customers for the electric energy they used somehow had disasterous implications for the national security, the Amendment is much too broad. So much so that it appears to be the ridiculous. It would not take a great deal of stretching for an employer to conclude that each and every employee or prospective employee "does" have or "would" have access to computers or other equipment or facilities related to the production, transmission and distribution of electric energy.

The fact we have drawn attention to the width and breadth of the exemption for utility workers is not an indication the narrowing of such an exemption would be acceptable. It is our firm opinion that the devices are unreliable and it is both degrading and humiliating. There is no evidence to show that the prohibition of the lie detectors use in prehire interviews or in determining discipline, discharge or promotions for existing employees have rendered harm to the employer, national security or the national interest. Nor has there been any evidence to show that its use by utility employers has enhanced the employer's ability to carry on his business, make an adequate profit or the ability to supply an uninterrupted flow of energy to its customers or the public.

We suspect that the inclusion of this exemption is the result of the unreasonable hysteria of possible dangers from workers at the nuclear generating stations using drugs, or engaging in other activities that could cause an unusual event, including the release of massive amounts of radiation. If this be the case, the concern is misplaced and the exemption totally unnecessary. The Nuclear Regulatory Commission and the American Nuclear Society of the American National Standards Institute have developed very extensive standards for the security of nuclear generating plants, including the screening of potential employees and the continual evaluation of employees who will have "unescorted access" to such nuclear facilities. (See ANSI/ANS 3.3, 1982 - Paragraph 50.34(h) of 10 CFR Part 50 - and Paragraph 73.56(c) of 10 CFR Part 73) (49 FR 30735-August 1, 1984).

These screening and evaluation standards are much more extensive than is required and we have serious concerns with many of the provisions. They are without a doubt the most extensive requirements required by private industry yet neither set of standards demand, suggest, or require the application of a lie detector test. It is not clear from the standards whether the Nuclear Regulatory Commission and the American Nuclear Society failed to include the use of lie detectors in its screening, and evaluation standards were based on the inaccuracies of the device or based on the concerns for preserving the individual's rights under the First Amendment to the Constitution, e.g. the rights to free speech, free association, and privacy. In any event, these experts in such matters have concluded the lie detector tests are of no value, they are not needed to make a proper evaluation as to the acceptability of a prospective employee or the continued acceptability of a long-term trusted worker.

The basic components of the program is (1) a Background Investigation which would include employment, credit, educational, criminal and military service histories for a retrospective period of five years or since age 18, whichever is shorter; (2) Psychological Assessment consisting of personality tests such as the Minnesota Multiphasic Personality Inventory and clinical interviews by an experienced and licensed psychiatrist or psychologist for those whose personality tests are inconclusive and (3) a Continual Behavioral Observation Program designed to detect behavioral changes.

If the major concerns which gave rise to the exemption for electric utilities was the protection of the nuclear plants and the nuclear materials, the concerns are clearly misplaced as the above information clearly shows the agency which is most directly responsible for such matters has no interest in the use of such a device and has no concerns with regard to being prohibited from such use. The leading experts gathered together for the development of such standards evidently concluded it was of no value in making the types of determinations required in employee selection and the continual evaluation of employee veracity.

If the concerns in adopting the Broomfield Amendment was not the fact electric utilities are licensed to operate nuclear plants, the concerns with electric utilities is even more misplaced. The only thing that makes an electric utility unique is the nuclear plant. In all other respects it is not different than most any other industry especially the other utility industries. An electric utility produces a manufactured product, it transmits that product to its distribution centers where it is distributed to the consumers, be they residential, commercial, industrial or governmental. A natural gas utilitiy produces a product which is transmitted to its distribution systems and from there to basically the same types of customers -- a communications facility the same, a water utility the same and in fact, all other industries as well. While the systems of delivery in some cases is generally automatic and others must have human hands to help along the way is of little consequence.

All utilities and all other industries must maintain proper accounting of its products through the manufacturing or generation period, throughout the transmission and distribution as well and it must make a proper accounting to the consumer and collect appropriate compensation. The need for honest and trustworthy employees is no greater in the electric utilities as in any other utility or industry and there is clearly no special need for exemption under the "Polygraph Protection Act of 1985".

Since there is clearly no compelling need to exempt the electric utilities from coverage of S. 1815, we urge the Committee to leave the provisions unchanged and not permit any exemptions beyond those included in the original draft of the Bill.

# STATEMENT OF MR. PETE P. PETRO,

PRESIDENT OF WEDLO, INC.,

before the

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

April 24, 1986

Mr. Chairman and Members of the Committee:

My name is Pete Petro, and I serve as President of Wedlo, Inc., a wholly-owned subsidiary of the Tampa-based Jim Walter Corporation. Our Wedlo headquarters is located in Birmingham, Alabama. We are a nationally recognized diamond wholesaler operating under the name of Everwed. In addition, our Lorch's jewelry chain has some fifty retail outlets in Alabama, Mississippi, and Tennessee.

I strongly voice my opposition to proposed legislation which would prohibit the use of polygraph testing by employers in the private sector. As you are well aware, polygraph examinations are currently used in a variety of important contexts, including a wide range of retail industries, such as the jewelry industry. My company is concerned that adoption of the proposed legislation will have a tremendous, negative impact on our ability, as employers, to detect and combat internal theft.

Owing to the very nature of our business, most of our employees have frequent access to costly diamonds and other precious gemstones, watches and jewelry. The judicious use of polygraph testing is an important part of our efforts to combat internal shortages and theft.

According to estimates by the American Retail Federation, an organization representing more than one million stores across the United States, more than 40 percent of inventory losses are due to internal theft. This nationwide problem is costing American retailers, and ultimately the American consumer, an amount greater than ten billion dollars every year. The proper use of polygraph testing is one of the few effective means we have of fighting this unfortunate problem.

I have been President of Wedlo since 1970. When I assumed this position, our losses attributable to employee theft amounted to eight percent of inventory. Since we began our program of reasonable and systematic testing with polygraphs, these types of losses have been reduced to only one percent of inventory. To be deprived of the protection of this very useful tool would serve to greatly negate the successes of our program.

It is vitally imperative that we hire only those prospective employees who meet the highest possible standards of honesty and integrity. As a part of our efforts to reach this goal, we do screen employees by administering polygraph tests. At the same time, however, we recognize that polygraph tests are not infallible, and that their results should not be utilized in an arbitrary and capricious manner. Because of this, we use such tests as an aid in evaluating the honesty and integrity of our work force, but make no personnel decisions on the sole basis of a polygraph examination.

We are aware of the serious, and legitimate, issues which have been raised about the potential for abuse in the area of polygraph examinations. Indeed, we are not opposed to legislation which would provide reasonable standards for those conducting polygraph examinations, restrict the types of questions allowed, and, in general, establish appropriate safeguards.

Mr. Chairman, my company is not here today to ask for the right to discriminate against our employees, or to infringe upon their rights in any way. It is our policy to treat our employees fairly, but, although we recognize the necessity of protecting our employees, we cannot ignore our financial concerns and the role they play in providing jobs for those same employees. Just as we owe a duty to our employees, we also have certain responsibilities for our shareholders and investors. In this light, it is important to realize that polygraph examinations, properly administered, can serve not only to protect the interests of our shareholders, but can also serve to protect our employees against false accusations and circumstantial evidence.

Our polygraph program is reasonable, it is judicious, it is even-handed and fair. We ask that our industry not be stripped of this invaluable protective tool.

Thank you, Mr. Chairman

# STATEMENT OF THE NATIONAL ASSOCIATION OF CATALOG SHOWROOM MERCHANDISERS

United States Senate Labor and
Human Resources Committee

Concerning, S.1815, a bill to prohibit the use
of polygraph for employment purposes

The National Association of Catalog Showroom Merchandisers (NACSM) represents the $10 billion catalog showroom industry which joins with the hundreds of organizations which . use polygraph in a responsible manner in oppossing the outright prohibition of our use of polygraph for employment purposes.

NACSM supports regulation of polygraph and its limitation, focused to meet legitimate industrial use to prevent theft, inventory shrinkage, and other such purposes.

The suggested premises for an outright ban on the use of polygraph is its unreliability. Yet the United States Congress passed a law last year strongly supporting the use of polygraph for defense purposes, and the United States House of representatives has just passed a bill which exempts a wide variety of industries from its prohibition.

This is hardly supportive of the notion that polygraph is always unreliable. NACSM offers to work closely with the Congress in fashioning a bill regulating the use of polygraph with minimum standards, limited questions, and certified polygraphers and tests. We believe that we can fashion a wide cross section of the security, securities, drug, child care, jewelry and retail industries to support meaningful regulation, and most respectfully request consideration of a regulatory approach.

NACSM anticipates discussing this issue with the Senate in the weeks to come, and we sincerely appreciate the concern of the committee for this subject, and are fashioning a bill in the public interest.

Respectfully submitted
by the;
National Association of
Catalog Showroom Mechandisers

Richard B. Kelly, General Counsel
230 Park Avenue
New York, New York 10169
(212) 687-8930
May 8, 1986

## STATEMENT OF ROGER MIDDLETON BERNSEN

Roger Bernsen
3030 S. W. 144 terrace
Davie, Florida 33330
305-475-0510

Dear Senator Hatch,

Enclosed is a copy of a Political cartoon I composed, the subject is poly**GRAFTING.** I beg you to read it. I understand you and your colleauges are drafting Laws that would prohibit the use of poly**graphing** in the private sector.

**PASS THOSE LAWS! with no exceptions!**

Senator, I understand the issues as well or better than any one on the Planet today, for I am one of its Casultiy's, a victim of the Machine, its Operators and all that are Associated with it.

A question I have for you Senator; is how many Hundereds of Thousands of **AMERICANS** died to preserve and protect those Ideals we call the **BILL OF RIGHTS (Procedural Due Process).**

The principle issue at Heart is does the machine work when it is suppose to? **NO!**

The polygraphs weaknesses are self eveident, for Truth is not measured; "Tremor in the Blood", a gasp of relief, or a multitude of responses cannot replace the justice that prevails under Due Process.

TRUTH IS A SINGLE ENTITY! Only the SOUL can bear witness to what is the Truth. Only GOD has the power to reveal and lift the Veil of Honesty.

These so-called examiners of truth have elevated themselves to the level of Supreme Judgement and made Orwell's Visions Reality--Man's Life, Liberty and Sacred Honor judged by a machine. This mockery of justice has to be viewed by Man as Intolerable and unacceptable, for the machine has no Soul. Unlike machines, we do have a Soul "La difference" and its the souls of twelve good Men and Women that have the right to shape a Man's Destiny.

Senator, on the following page you will find the capsulization of my story, its three years in the making.

If I can help, call.

Sincerly,
Roger Middleton Bern
Roger Middleton Bernsen

(EDITOR'S NOTE: Due to printing limitations, the cartoon had to be retained in the files of the committee. Sorry!)

In the spring of 1983 a series of thefts were committed at a jewelry store in Plantation, Florida. At the time I was working with a company by the name of Black, Starr, and Frost as "in house" Jewelry Designer, Goldsmith, and Diamond Setter.

The thefts were in the neighborhood of $200,000.00 dollars a sizable loss on any balance sheet. (Just the right type of road test for a machine that threatens to replace the whole Justice system). After all, think of all the time it saves, "It will Judge, Jury and convict in less than one afternoon".

Once again at issue, the theft and or switching of approximatly fifteen stones. A very sensitive subject for a profession based on trust.

At this point there where two choices available to the company; **(A)** Turn the investigation over to the police and help and assist them with the normal investigative techniques used in apprehending villans and the vindication of the innocent, what we call Procedural DUE PROCESS.

But in the alternative they chose **(B)**, an "in house" investigation. Unfortunatly, "in house" meant behind closed doors, an option made available to them by the poly**graft** industry.

In April of 1983, my fellow employees and I were asked to take polygraph tests, all of us passed the test, however the thefts continued and all were re-tested in May.

After six hours of Gestapo like interrogation, and polygraphing by a group including the senior security man from the parent corporation, three members of the poly**graft** firm and a Plantation police detective, I became the object of blame.

Consequently, I was fired the following day, and because of the extreme sensitivity of the jewelry trade to questions of integrity, I have been unable to practice my profession in the manner in which I was accustomed.

However, on October 26,1983 a past employee with B.S.F., (who had been vindicated by the machine and its operators six months earlier), was charged with perpetrating an identical crime while working for a competitor, (humilliating the polygrafters and their patrons is part of their web of deceite.)

Unfortunately, the travesty at B.S.F. continued for B.S.F. ignored their **obligation of justice** to ~~pursue~~ and prosecute this woman and her compatriots. Which could of absolved me of this career threatening crime.

In conclusion, Senator, we can clearly see the machine and its operators **failed the test!**. Though there are hundreds of victims of this machine, the atrocity here is that the true thief, the professional liar, basks in his unconsconable glory, knowing full well that some lamb will be sacrificed in his place.

**THEREFORE PASS THOSE LAWS, WITH NO EXCEPTIONS! In memory of the lambs, and the hundreds of thousands of Americans who died to protect our right to trial by a jury of our equals, and not our lessers. (By almighty God I swear the machine is not our equal, but is our lesser).**

Sincerly,
Roger Middleton B
Roger Middleton Bernsen

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